ANALYSE COMPARATIVE
DES ÉCHANGES DE RENSEIGNEMENTS ET
DE L'ENTRAIDE ENTRE
LES AUTORITÉS CHARGÉES DE L'APPLICATION DE LA LOI AU CANADA ET AUX ÉTATS-UNIS

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Le présent document examine les mécanismes actuels d'échange de renseignements et d'entraide entre les gouvernements du Canada et des États-Unis dans les domaines des valeurs mobilières et de la fiscalité. L'analyse qui suit décrit le contexte permettant d'évaluer les propositions en faveur de l'établissement de semblables pratiques de confidentialité et d'entraide entre les autorités antitrust canadiennes et américaines.

En matière pénale, il existe un cadre législatif qui vient appuyer l'entraide et l'échange de renseignements entre les autorités canadiennes et américaines. Le Traité d'entraide juridique (« **TEJ** ») et la *Loi sur l'entraide juridique en matière criminelle* (« **LEJMC** ») établissent une procédure et un accord contractuel pour l'entraide juridique et l'échange de renseignements. En matière civile toutefois, aucun régime global ne vient régir l'échange de renseignements et l'entraide. Le Bureau de la concurrence se penche sur des propositions de modifications législatives qui énonceraient expressément son pouvoir de communiquer avec des autorités étrangères dans des affaires relatives aux dispositions civiles de la *Loi sur la concurrence*, à savoir à l'égard des fusionnements et des questions assujetties au contrôle judiciaire (agissements anticoncurrentiels et pratiques commerciales déloyales). En guise d'étape préliminaire, le Bureau de la concurrence a commandé la présente étude, qui fournit une analyse comparative du droit et de la pratique actuels en matière d'entraide et d'échange de renseignements entre les autorités canadiennes et américaines dans les domaines des valeurs mobilières et de la fiscalité.

Comme les valeurs mobilières relèvent de la compétence des provinces au Canada, la présente étude examine les protocoles d'entente actuellement en vigueur entre la Securities and Exchange Commission américaine et les commissions des valeurs mobilières provinciales en Ontario et au Québec. Dans le domaine de la fiscalité, l'échange de mesures d'entraide et de renseignements est régi par la Convention fiscale entre le Canada et les États-Unis ainsi que par les lignes directrices internes respectives de Revenu Canada et de son homologue américain, l'Internal Revenue Service. La conclusion qui s'impose est que les arrangements actuels donnent aux autorités un vaste pouvoir discrétionnaire en matière d'échange de renseignements avec leurs homologues outre-frontière. Les arrangements contiennent habituellement des définitions et des garanties visant les renseignements confidentiels et leur communication à des tiers mais, à quelques très rares exceptions près toutefois,

ils n'exigent pas l'obtention d'une autorisation judiciaire préalable à la demande ou à la communication de renseignements.

Ainsi qu'il a été mentionné plus haut, au Canada, la réglementation des valeurs mobilières relève de la compétence des provinces. Le présent rapport se concentre sur les lois relatives aux valeurs mobilières du Québec et de l'Ontario. Les règles relatives à l'entraide sont énoncées dans les lois sur les valeurs mobilières de ces provinces dans la mesure où celles-ci confèrent toutes deux aux commissions des valeurs mobilières le pouvoir d'aider des ressorts étrangers qui présentent des demandes de renseignements. De plus, la Securities and Exchange Commission américaine, la commission des valeurs mobilières de l'Ontario, la commission des valeurs mobilières du Québec et la commission des valeurs mobilières de la Colombie-Britannique ont conclu un protocole d'entente visant à faciliter et à encourager l'entraide entre ces ressorts. Le protocole d'entente souligne l'intention des parties d'apporter le plus d'entraide possible en ce qui a trait aux enquêtes, aux procédures judiciaires et aux poursuites. Le protocole d'entente ne réglemente pas les modalités concrètes d'échange des renseignements mais il précise plutôt l'intention des parties, ce qui est plus important.

Les règles régissant l'échange de renseignements dans le domaine des valeurs mobilières se sont développées de façon informelle par la pratique. Essentiellement, il y a transmission de renseignements par suite de la présentation d'une demande soit de façon informelle, soit de façon formelle, selon la nature de l'information demandée. En aucun cas toutefois l'obtention d'une autorisation judiciaire n'est exigée soit pour faire une demande de renseignements à une autorité étrangère, soit pour transmettre des renseignements à la demande d'une autorité étrangère. Les renseignements qui se trouvent dans les dossiers de la commission des valeurs mobilières sollicitée, parce qu'ils sont des renseignements publics ou des renseignements qui ont été fournis volontairement dans le cadre d'une enquête, peuvent sans aucune autre formalité faire l'objet d'un échange de la part du personnel de la commission des valeurs mobilières. Si les renseignements demandés constituent des renseignements obtenus par la contrainte par la commission des valeurs mobilières dans le cadre d'une de ses propres enquêtes ou des renseignements qui obligent la commission à procéder à une enquête ou à user de contrainte pour les obtenir, alors une ordonnance de la commission est nécessaire pour qu'il y ait communication de ces renseignements.

Demandes faites par la CVMQ et la CVMO auprès de la SEC

La CVMQ et la CVMO peuvent demander des renseignements à la SEC sans devoir obtenir d'autorisation judiciaire. Les scénarios de demandes de renseignements possibles sont les suivants :

- faire une demande ou échanger des renseignements lorsqu'il s'agit de renseignements que la SEC possède déjà et qui constituent des renseignements publics ou quasi-publics;

- faire une demande ou échanger des renseignements lorsqu'il s'agit de renseignements que la SEC possède déjà et qui lui ont été fournis volontairement ou qu'elle a obtenus dans le cours normal de ses opérations;

- faire une demande ou échanger des renseignements lorsque la SEC a dû recourir à la contrainte pour les obtenir[1];

- faire une demande ou échanger des renseignements lorsque la SEC doit instituer une enquête pour les obtenir[2].

Demandes faites par la SEC auprès de la CVMQ et de la CVMO

La SEC peut demander des renseignements à la CVMQ et à la CVMO sans que ces dernières ne soient tenues d'obtenir une autorisation judiciaire pour y donner suite. Les scénarios de demandes de renseignements possibles sont les suivants :

- faire une demande ou échanger des renseignements lorsqu'il s'agit de renseignements que la CVMQ ou la CVMO possède déjà et qui constituent des renseignements publics ou quasi-publics;

- faire une demande ou échanger des renseignements lorsqu'il s'agit de renseignements que la CVMQ ou la CVMO possède déjà et qui ont été fournis volontairement à la CVMQ ou à la CVMO ou obtenus dans le cours normal des opérations;

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[1] Même s'il n'est jamais nécessaire d'obtenir une autorisation judiciaire pour l'échange de renseignements, la commission des valeurs mobilières doit autoriser l'échange de renseignements avant que ceux-ci ne soient effectivement transmis.

[2] *Supra*, note 1.

- faire une demande ou échanger des renseignements lorsque la CVMQ ou la CVMO a dû recourir à la contrainte pour les obtenir[3];

- faire une demande ou échanger des renseignements lorsque la CVMQ ou la CVMO doit instituer une enquête pour les obtenir[4].

Le régime fiscal s'apparente au régime des valeurs mobilières par le fait qu'en règle générale, il n'est pas nécessaire d'obtenir une autorisation judiciaire pour pouvoir procéder à une demande de renseignements ou à un échange de renseignements recueillis à l'occasion d'une demande. Au Canada, une autorisation judiciaire est exceptionnellement exigée pour l'échange de renseignements lorsque, comme cela est souligné plus loin sous les rubriques « Demandes présentées en vertu du droit fiscal canadien (par l'intermédiaire de la Direction de l'impôt international) aux États-Unis (Assistant Commissioner – International) » et « Demandes américaines de renseignements fiscaux auprès du Canada », les règles fiscales d'un État subordonnent l'obtention de tels renseignements à la délivrance d'une autorisation judiciaire. Toutefois, contrairement au régime des valeurs mobilières, les règles régissant l'échange de renseignements fiscaux sont établies de façon plus formelle dans les lignes directrices internes préparées par les autorités responsables au Canada comme aux États-Unis, lesquelles soulignent les différents types d'échanges de renseignements qui peuvent avoir lieu.

Les échanges de renseignements entre les autorités fiscales peuvent se faire spontanément, automatiquement ou sur demande. Les échanges spontanés portent sur des renseignements qui sont obtenus au cours d'une enquête ou d'une vérification et qui semblent présenter un certain intérêt pour les autres autorités fiscales. Les échanges automatiques ont lieu lorsqu'il s'agit de renseignements portant sur des dividendes, des intérêts etc. touchés dans un ressort par une personne qui n'y réside pas. Les demandes particulières sont des demandes de renseignements qui sont jugés nécessaires pour la tenue d'une vérification ou d'une enquête. Les demandes et les échanges de renseignements doivent passer par l'« autorité compétente » de chaque ressort. L'autorité compétente pour le Canada

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[3] Même s'il n'est jamais nécessaire d'obtenir une autorisation judiciaire pour l'échange de renseignements, la commission des valeurs mobilières doit autoriser l'échange de renseignements avant que ceux-ci ne soient effectivement transmis.

[4] *Supra*, note 1.

est la Direction de l'impôt international, et pour les États-Unis, l'Assistant Commissioner (International).

Les pages qui suivent résument les règles servant à déterminer s'il faut obtenir une autorisation judiciaire pour demander ou échanger des renseignements dans le domaine du droit fiscal.

Demandes présentées en vertu du droit fiscal canadien (par l'intermédiaire de la Direction de l'impôt international) aux États-Unis (Assistant Commissioner – International)

'En qualité d'autorité canadienne compétente, la Direction de l'impôt international peut demander des renseignements à son homologue américain, l'Assistant Commissioner (International), sans être tenue d'obtenir une autorisation judiciaire. Les scénarios de demandes de renseignements possibles sont les suivants :

- faire une demande ou échanger des renseignements lorsqu'il s'agit de renseignements que le gouvernement américain possède déjà et qui lui ont été fournis volontairement ou qu'il a obtenus dans le cours normal de ses opérations;

- faire une demande (pourvu qu'il y ait réciprocité) ou échanger des renseignements lorsqu'il s'agit de renseignements que le gouvernement américain possède déjà et qu'il a obtenus dans le cadre d'une enquête;

- faire une demande (sauf dans les cas où une autorisation judiciaire serait exigée en vertu de l'article 231.1 (mandats de perquisition), du paragraphe 231.2(2) (personnes non désignées nommément) ou du paragraphe 231.1(2) (maison d'habitation)) ou échanger des renseignements lorsque le Canada demande aux États-Unis de recueillir les renseignements.

Communication volontaire de renseignements par l'autorité fiscale canadienne à l'autorité fiscale américaine sans demande particulière

Le Canada peut communiquer volontairement des renseignements fiscaux aux États-Unis sans recevoir de demande particulière et sans être tenu d'obtenir une autorisation judiciaire. Les type de renseignements qui pourraient être visés par cette situation sont les suivants :

- communiquer des renseignements que le gouvernement canadien a obtenus volontairement ou dans le cours normal de ses opérations;

- communiquer des renseignements (sauf s'il s'agit de documents ou de renseignements visés par une ordonnance judiciaire de saisie) que le gouvernement canadien a obtenus dans le cadre d'une enquête.

Demandes américaines de renseignements fiscaux auprès du Canada

Le Canada peut répondre aux demandes américaines de renseignements fiscaux sans devoir obtenir d'autorisation judiciaire. Les scénarios de demandes de renseignements possibles sont les suivants :

- faire une demande ou échanger des renseignements lorsqu'il s'agit de renseignements que le gouvernement canadien possède déjà et qui ont été fournis volontairement ou qu'il a obtenus dans le cours normal de ses opérations;

- faire une demande ou échanger des renseignements (sauf s'il s'agit d'un cas d'ordonnance judiciaire de saisie) que le gouvernement canadien a obtenus dans le cadre d'une enquête;

- faire une demande ou échanger des renseignements (sauf dans les cas où une autorisation judiciaire serait exigée en vertu de l'article 231.1 (mandats de perquisition), du paragraphe 231.2(2) (personnes non désignées nommément) ou du paragraphe 231.1(2) (maison d'habitation)) lorsque le Canada demande aux États-Unis de recueillir les renseignements.

Réponses américaines données aux demandes canadiennes de renseignements fiscaux

Les autorités américaines peuvent répondre aux demandes canadiennes de renseignements sans être tenues de demander une autorisation judiciaire. Les scénarios de demandes de renseignements possibles sont les suivants :

- communiquer des renseignements que le gouvernement américain a obtenus volontairement ou dans le cours normal de ses opérations;
- communiquer des renseignements que le gouvernement américain a obtenus dans le cadre d'une enquête.

Dans le domaine des valeurs mobilières et du droit fiscal, le Canada et les États-Unis semblent avoir élaboré des relations de travail pratiques relativement à l'entraide. Dans ces deux domaines, les autorités gouvernementales compétentes ont mis l'accent sur l'échange de renseignements de la façon la plus simple et la plus efficace.

ANALYSE COMPARATIVE DE L'ÉCHANGE DE RENSEIGNEMENTS ET DE L'ENTRAIDE ENTRE LES AUTORITÉS CHARGÉES DE L'APPLICATION DES LOIS AU CANADA ET AUX ÉTATS-UNIS

1. INTRODUCTION

Le présent rapport dresse une analyse comparative des régimes d'entraide et d'échange de renseignements établis entre les autorités canadiennes et américaines chargées de l'application de la loi dans les domaines des valeurs mobilières et du droit fiscal.

Le rapport commence par un bref sommaire des dispositions actuelles sur la confidentialité et sur l'échange de renseignements en vertu de la *Loi sur la concurrence*[5]. Suit un aperçu des échanges de renseignements dans le contexte pénal en vertu du Traité d'entraide juridique[6] (« **TEJ** ») entre le Canada et les États-Unis, ce traité s'appliquant notamment à l'égard de la concurrence, des valeurs mobilières et de la fiscalité.

En ce qui a trait à la présentation propre au régime des valeurs mobilières et à celui du droit fiscal, la première section du rapport visant chaque régime résume la définition et la portée de la notion de « renseignements confidentiels » au sens des lois canadiennes, des lois américaines et des traités pertinents entre le Canada et les États-Unis pour ce domaine particulier du droit. Cette section est suivie d'une description des approches relatives au cheminement des renseignements ainsi que le prévoient les lois pertinentes. Cette deuxième section décrit les types de demandes de renseignements qui peuvent être faites et la compétence pour communiquer ces renseignements. De plus, le cas échéant, cette section établit une distinction entre les types de demandes en se fondant sur les catégories de renseignements demandés, de même qu'entre les renseignements fournis volontairement et les renseignements obtenus par voie de contrainte. Le rapport énumère ensuite, pour chaque régime, la pratique effectivement suivie par les organismes d'application des lois intéressés lorsqu'il y a échange de renseignements et prestation de mesures d'entraide.

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[5] *Loi sur la concurrence*, L.R.C. (1985), ch. C-34.
[6] Gazette du Canada, Partie 1, 953 (1990).

En ce qui a trait aux régimes des valeurs mobilières et des lois fiscales, le rapport décrit en outre les garanties mises en place pour protéger le caractère confidentiel des renseignements s'il s'agit d'échanges de renseignements de cette nature. Le rapport résume enfin les sanctions, s'il en est, prévues dans chaque régime à l'égard des manquements à l'obligation de préserver la confidentialité des renseignements.

Le présent rapport est essentiellement établi à partir d'une revue sommaire du cadre législatif applicable et, le cas échéant, de guides administratifs, de même que d'entrevues téléphoniques avec des représentants des autorités compétentes. Dans le cadre du mandat à l'origine de la préparation du présent rapport, nous n'avons procédé à aucun examen particulier de la jurisprudence ni sollicité aucun avis auprès de conseillers juridiques compétents dans les ressorts extérieurs à la province de Québec. Le présent rapport ne saurait par conséquent comprendre quelques opinions juridiques ni servir à de telles fins.

2. LA LOI SUR LA CONCURRENCE

A. Renseignements confidentiels

L'article 29 de la *Loi sur la concurrence* interdit au personnel du Bureau de communiquer :

- l'identité d'une personne de qui des renseignements ont été obtenus;
- des renseignements obtenus dans l'exercice de pouvoirs officiels; et
- des renseignements fournis à l'occasion d'avis de projet de fusionnement ou de demandes de certificat de décision préalable,

sauf

- à un organisme canadien chargé du contrôle d'application de la loi ou
- dans le cadre de l'application ou du contrôle d'application de la *Loi sur la concurrence.*

La position du Bureau[7] est la suivante : il peut communiquer des renseignements confidentiels à un organisme étranger chargé du contrôle d'application de la loi lorsque la communication est nécessaire aux fins de l'application ou du contrôle d'application de la *Loi sur la concurrence*, c'est-à-dire lorsqu'une telle communication aiderait le Bureau à recevoir de l'aide ou de la collaboration de cet organisme à l'égard d'une enquête canadienne. Afin d'encourager l'application volontaire de la *Loi sur la concurrence*, le Bureau a comme politique d'accorder aux renseignements obtenus autrement que par l'application de l'article 29 (à savoir des renseignements fournis volontairement) le même caractère de confidentialité que celui des « renseignements en vertu de l'article 29 ». Toutefois, les deux types de renseignements sont susceptibles d'être communiqués à un organisme étranger chargé du contrôle d'application de la loi lorsqu'une telle communication permettrait de faire avancer l'enquête visant une affaire canadienne.

Lorsque le Bureau reçoit une demande visant des renseignements qui se trouvent déjà dans ses dossiers, ces renseignements seraient communiqués à l'autorité étrangère en vertu de l'exception

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[7] Bulletin publié par le Bureau de la concurrence, Industrie Canada – 1995-05-01, joint à titre d'Annexe A.

prévue à l'article 29 de la *Loi sur la concurrence*. Dans les cas où les renseignements demandés ne se trouvent pas dans les dossiers du Bureau et qu'une enquête est nécessaire, c'est la procédure prévue dans le TEJ qui est applicable à l'obtention et à la communication des renseignements. Le TEJ ne s'applique toutefois qu'à l'égard de la communication de renseignements en matière pénale.

Dans le cadre d'une enquête, le Bureau recueille des renseignements de diverses sources. Les renseignements recueillis portent sur les ventes, les profits, les parts de marché, les stratégies concurrentielles et les coûts de production, de façon à permettre d'examiner et d'évaluer adéquatement l'état de la concurrence dans un secteur particulier. De plus, lorsqu'il juge que cela est approprié, le Bureau entre en contact avec des clients et des fournisseurs. Une partie importante des renseignements obtenus par le Bureau dans le cadre d'une enquête sont de nature délicate sur le plan commercial. Même si l'article 29 de la *Loi sur la concurrence* protège certains renseignements, ainsi qu'il a été mentionné plus haut, la pratique actuelle du Bureau est d'étendre la protection en vertu de l'article 29 à d'autres renseignements, « la communication des renseignements confidentiels n'étant pas la règle, mais l'exception. »[8] Outre l'échange de renseignements sous le régime de la *Loi sur la concurrence*, le Bureau peut aussi échanger des renseignements en vertu du TEJ, qui sera examiné plus loin.

B. Entente entre les États-Unis et l'Australie

(i) Le 27 avril 1999, le gouvernement des États-Unis d'Amérique et le gouvernement de l'Australie ont conclu une entente d'entraide relative à l'application des lois antitrust. L'entente stipule que les parties sont convenues de s'entraider et de coopérer sur une base de réciprocité en communiquant ou en obtenant des éléments de preuve antitrust pertinents susceptibles de les aider à établir les infractions aux lois antitrust ou à faciliter l'application ou le contrôle d'application de ces lois. Au nombre des mesures d'entraide figurent notamment la communication, l'échange et l'examen concerté d'éléments de preuve antitrust. L'entente prévoit l'obligation pour les parties, dans le respect de leurs lois respectives, de protéger le plus possible la confidentialité de toute demande et de tout renseignement communiqué en vertu de l'entente. Chaque partie s'engage également à s'opposer à toute demande de divulgation de renseignements de cette nature qui pourrait être

[8] Page 1 du Bulletin.

présentée par des tiers. L'entente établit la procédure à suivre pour demander et communiquer des renseignements. De plus, aucune autorisation judiciaire préalable n'est nécessaire pour demander ou pour communiquer de tels renseignements. L'entente précise en outre les utilisations possibles des renseignements obtenus, de même que les pénalités en cas de communication non autorisée ou illégale d'éléments de preuve.

(ii) L'affaire *Schreiber*

Dans l'affaire *Schreiber c. Canada (Procureur général)*, [1998] 1 R.C.S. 841, la Cour suprême du Canada était appelée à déterminer si la norme canadienne applicable à la délivrance d'un mandat de perquisition devait être respectée avant que le ministre de la Justice présente aux autorités suisses une lettre les priant d'apporter leur aide à l'égard d'une enquête criminelle canadienne. La Section de première instance de la Cour fédérale avait conclu que la norme canadienne applicable à la délivrance d'un mandat de perquisition devait être respectée. La Cour d'appel fédérale a confirmé à la majorité cette décision. La Cour suprême du Canada a toutefois, dans un arrêt majoritaire, conclu que l'envoi d'une lettre de demande aux autorités suisses n'était pas visé par l'article 8 de la *Charte canadienne des droits et libertés*. Par conséquent, il n'y avait pas d'obligation d'obtenir une autorisation judiciaire préalable pour faire cette demande puisque cette action ne portait pas atteinte au droit de l'individu d'être protégé contre le recours abusif aux pouvoirs de fouille, de perquisition et de saisie. C'est en Suisse que ces actions ont été entreprises. Le gouvernement canadien n'a pas procédé à une opération de fouille, de perquisition et de saisie, mais uniquement demandé qu'elle soit entreprise.

C. Traité d'entraide juridique

Le Traité d'entraide juridique conclu entre le gouvernement du Canada et le gouvernement des États-Unis d'Amérique prévoit l'entraide pour la recherche, la poursuite et la répression du crime. Le TEJ ouvre une voie pratique pour l'obtention d'une vaste gamme de mesures d'entraide juridique en matière pénale et crée une obligation contractuelle d'entraide entre les parties. Le TEJ permet aux autorités judiciaires d'un pays de communiquer avec une autorité centrale de l'autre pays, éliminant ainsi la nécessité de recourir aux interventions par la voie diplomatique marquées par la longueur et l'obligation d'obtenir une autorisation judiciaire. Le TEJ facilite en outre l'échange d'éléments de preuve sous une forme qui sera admissible devant les tribunaux de l'État qui en fait la demande.

De façon générale le TEJ prévoit, entre autres, les sortes de mesures d'aide suivantes :

a) la signification de documents dans l'État requis;

b) la recherche ou l'identification de personnes ou d'objets dans l'État requis;

c) la transmission de documents, de dossiers et d'éléments de preuve situés dans l'État requis;

d) l'exécution de demandes de perquisition, fouille et saisie dans l'État requis;

e) toute autre forme d'entraide qui n'est pas interdite par les lois de l'État requis.

Au Canada, le TEJ est mis en oeuvre par la *Loi sur l'entraide juridique en matière criminelle* (« **LEJMC** »)[9]. La LEJMC prévoit notamment la procédure pour apporter des mesures d'aide en vertu du TEJ.

En ce qui concerne le Canada, le terme « infraction » désigne « une infraction établie par une loi du Parlement et pouvant être poursuivie par voie de mise en accusation, ou une infraction établie par la Législature d'une province et mentionnée à l'Annexe »[10]. L'annexe incorpore dans la définition d'infraction des infractions établies par les législatures des provinces dans les domaines des valeurs mobilières, de la protection de la faune, de la protection de l'environnement et de la protection des consommateurs.

Le TEJ habilite le Canada et les États-Unis, à titre de parties, à demander que les autorités de l'autre partie prennent des mesures respectant leurs propres lois en vigueur pour fournir des renseignements qui autrement seraient confidentiels, ou à produire des documents et à délivrer des mandats de perquisition. Il peut y avoir entraide sans égard au fait que la conduite visée par l'enquête constitue ou non une infraction dans l'État requis.

Le TEJ permet au Canada et aux États-Unis de refuser l'entraide lorsque « la demande n'est pas conforme aux dispositions du présent Traité, ou l'exécution de la demande est contraire à son intérêt public, tel que déterminé par son Autorité centrale[11]. »

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[9] Chapitre M-13.6 (L.R., (1985), ch. 30 (4e suppl.)).
[10] Article I du TEJ.
[11] Clause 1 de l'article V du TEJ. L'« autorité centrale » est définie à l'article I du TEJ, à savoir, au Canada, le ministre de la Justice, et aux États-Unis, le ministère de la Justice.

Il est important de souligner que selon la définition que lui donne le TEJ, l'« intérêt public » désigne tout intérêt majeur relatif à la sécurité nationale ou toute autre politique essentielle de l'État[12] ».

(i) Renseignements confidentiels

Les renseignements échangés en vertu du TEJ sont fournis en toute confidentialité. L'État qui a demandé les renseignements ou les éléments de preuve ne peut divulguer les renseignements ni utiliser les éléments de preuve à d'autres fins que celles qui ont été énoncées dans la demande[13]. L'État requérant peut toutefois, avec l'accord écrit préalable de l'État requis, utiliser ces renseignements ou éléments de preuve à d'autres fins dont les parties auront convenu. Dès que les renseignements tombent dans le domaine public en vertu d'une procédure appropriée, ils suivent les règles des documents publics dans l'État requérant. Ils peuvent dès lors servir à toute fin.

(ii) Cheminement des renseignements – Demandes, réponses et prestation

Au Canada, toutes les demandes en vertu du TEJ doivent passer par le ministre de la Justice. Aux États-Unis, l'autorité centrale est le Commissioner, Office of International Affairs, Criminal Division, U.S. Department of Justice. Les autorités centrales présentent des demandes en vertu du TEJ au nom des autorités d'application de la loi et des autorités judiciaires dans leur pays qui ont la responsabilité légale de mener des enquêtes et d'engager des poursuites à l'égard de comportements criminels. Aux États-Unis, cette catégorie comprend les procureurs fédéraux et les procureurs des États. Au Canada, elle comprend les procureurs de la Couronne. L'entraide ne peut être obtenue aux termes du TEJ qu'après l'engagement d'une enquête ou d'une poursuite par l'État requérant. Aux États-Unis, une enquête peut être entreprise par un procureur, un grand jury, un organisme doté de responsabilités d'application du droit pénal (comme l'Internal Revenue Service) ou un organisme de réglementation (comme la Securities and Exchange Commission). De même, au Canada, une enquête peut être instituée par un procureur de la Couronne, un organisme doté de responsabilités d'application du droit pénal ou un organisme de réglementation. Une demande de renseignements en vertu du TEJ doit contenir tous les renseignements dont l'État requis a besoin pour exécuter la demande, notamment :

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[12] Article I du TEJ.
[13] Clause 2 de l'article IX du TEJ.

a) le nom de l'autorité compétente qui conduit l'enquête ou la procédure visées par la demande;

b) l'objet et la nature de l'enquête ou de la procédure visées par la demande;

c) une description des éléments de preuve, renseignements ou autres mesures d'entraide sollicités;

d) les fins pour lesquelles les éléments de preuve, renseignements ou autres mesures d'entraide sont sollicités, ainsi que les délais pertinents; et

e) toute exigence relative à son caractère confidentiel[14].

Le TEJ prévoit l'exécution diligente de toutes les demandes. De plus, les tribunaux de l'État requis ont compétence pour décerner des subpoenas, des mandats de perquisition et toute autre ordonnance nécessaire pour donner suite adéquatement et efficacement à la demande[15]. Même si le TEJ stipule que toutes les demandes doivent être faites par écrit, en cas d'urgence, la demande peut être faite verbalement, puis confirmée ensuite par écrit[16].

Il importe de noter que l'entraide et l'échange de renseignements qui peuvent être fournis en vertu du TEJ se limitent à la recherche, à la poursuite et à la répression du crime. De plus, ainsi qu'il a été mentionné plus haut, le mot « infraction » se limite, en ce qui a trait au Canada, aux infractions pouvant être poursuivies ainsi qu'à certaines infractions provinciales et, en ce qui a trait aux États-Unis, aux crimes.

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[14] Clause 3 de l'article VI du TEJ.
[15] Clause 1 de l'article VII du TEJ.
[16] Clause 2 de l'article VI du TEJ.

3. RÉGIME DU DROIT DES VALEURS MOBILIÈRES

A. Introduction

Au Canada, la réglementation sur les valeurs mobilières relève principalement du droit provincial. Les lois sur les valeurs mobilières des provinces sont édictées en vertu du pouvoir conféré aux provinces de légiférer à l'égard de « la propriété et des droits civils »[17]. Dans ce contexte, il existe de nombreux cas où les activités relatives aux valeurs mobilières s'étendent au-delà des frontières provinciales. En conséquence, il y a eu accroissement marqué de la collaboration interprovinciale, et ce, dans le but d'éviter des exigences incompatibles qui nuiraient au fonctionnement efficace des marchés des valeurs mobilières. Aux fins de présenter le régime du droit des valeurs mobilières « canadien », le présent rapport sera axé sur les règles relatives aux valeurs mobilières de l'Ontario et du Québec qui concernent les questions de confidentialité. Les règles et les procédures suivies en Ontario sont assez représentatives de celles qui s'appliquent dans les autres provinces de common law.

Aux États-Unis, la réglementation des valeurs mobilières relève principalement de l'État fédéral et, par conséquent, le présent rapport sera axé sur les dispositions fédérales américaines. La *Securities Act of 1933* et la *Securities Exchange Act of 1934* (la « ***U.S. Securities Act*** ») réglementent les valeurs mobilières au niveau fédéral. Le présent rapport portera principalement sur cette dernière loi étant donné qu'elle traite des questions concernant l'information confidentielle.

B. Renseignements confidentiels

(i) Québec et Ontario

L'un des éléments clés des lois sur les valeurs mobilières au Canada, l'Ontario et le Québec ne faisant pas exception, est la notion d'information continue. Cette information a notamment pour but de mettre à la disposition d'un épargnant tous les faits importants qui lui permettent de prendre une décision éclairée en matière de placement. L'obligation d'information continue n'est imposée qu'aux émetteurs qui sont des « **émetteurs assujettis** » au sens des diverses lois sur les valeurs

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[17] Paragraphe 92(13) de la *Loi constitutionnelle de 1982*, édictée comme l'annexe B de la *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.).

mobilières. Les émetteurs assujettis sont tenus de divulguer de l'information car leurs titres sont négociés sur des marchés dans lesquels les investisseurs éventuels sont réputés avoir besoin de l'information visée par l'obligation d'information continue. Par conséquent, une fois qu'une personne ou une société décide de placer ses titres au sens des définitions des lois sur les valeurs mobilières, elle devient assujettie aux règles qui y sont prévues. De plus, si cette personne ou cette société devient un « émetteur assujetti », elle est assujettie aux règles concernant l'information continue.

Toute l'information divulguée par un émetteur aux termes des règles relatives à l'information continue est publique et, par conséquent, non confidentielle. Dans certains cas, toutefois, l'information importante peut être transmise sous pli « confidentiel ». Par exemple, le paragraphe 75(3) de la *Loi sur les valeurs mobilières* (Ontario)[18] (la « ***Loi sur les valeurs mobilières de l'Ontario*** ») prévoit ce qui suit :

> 75 (3) *Idem.* –
>
> 75(3) Dans les cas suivants :
>
> *a)* l'émetteur assujetti est d'avis que la divulgation exigée par les paragraphes (1) et (2) serait indûment préjudiciable à ses intérêts;
>
> *b)* le changement important consiste en une décision de mettre à exécution un changement apporté par la direction générale de l'émetteur qui estime que le conseil d'administration ratifiera probablement cette décision et qui n'a aucune raison de croire que les personnes qui ont connaissance du changement important ont profité de cette connaissance en achetant ou en vendant des valeurs mobilières de l'émetteur,
>
> l'émetteur assujetti peut, plutôt que de se conformer au paragraphe (1), déposer sans délai auprès de la Commission le rapport exigé par le paragraphe (2) en y inscrivant une mention portant que le rapport est confidentiel et en motivant, par écrit, sa décision de ne pas divulguer le changement important.
>
> 75(4) *Idem.* –

[18] L.R.O. 1990, C.S.S., telle que modifiée.

> 75(4) Si un rapport a été déposé auprès de la Commission aux termes du paragraphe (3) et que l'émetteur assujetti estime que le rapport doit demeurer confidentiel, il en informe la Commission par écrit dans les dix jours suivant la date de son dépôt et, par la suite, tous les dix jours jusqu'à ce que le changement important soit divulgué au public de la manière prévue au paragraphe (1) ou, si le changement important consiste en une décision du genre de celle visée à l'alinéa 3 *b)*, jusqu'à ce que cette décision ait été infirmée par le conseil d'administration de l'émetteur.

Par conséquent, même si la règle générale exige que tous les faits importants soient divulgués, un émetteur assujetti peut produire de l'information auprès de la Commission des valeurs mobilières de l'Ontario (la « **CVMO** ») sous pli confidentiel si les exigences prévues à l'article 75 sont remplies. La ***Loi sur les valeurs mobilières* (Québec)**[19] (la « *Loi sur les valeurs mobilières* (Québec) ») prévoit des règles similaires permettant que les rapports qui doivent être produits le soient sous pli confidentiel. Lorsque l'information est divulguée à la Commission des valeurs mobilières du Québec (la « **CVMQ** ») sous pli confidentiel, cette information ne peut être divulguée par la CVMQ à qui que ce soit.

Hormis les rapports déposés qui sont considérés confidentiels, lorsque les commissions des valeurs mobilières mènent des enquêtes, l'information obtenue au moyen de celles-ci est réputée confidentielle. Au Québec, à cet égard, l'article 244 de la *Loi sur les valeurs mobilières* (Québec) prévoit que les enquêtes se déroulent « à huis clos ». En Ontario, l'article 16 de la *Loi sur les valeurs mobilières* (Ontario) prévoit que tout rapport, tout témoignage, ou document, etc. obtenu dans le cadre d'une enquête est réputé confidentiel.

Par conséquent, une société qui est un « émetteur assujetti » est tenue de divulguer continuellement de l'information à son sujet. Cette information est publique et inclut, notamment, l'information financière et celle concernant tous les changements importants survenus dans les affaires de l'« émetteur assujetti ». Certains avis de changements importants peuvent être déposés en toute confidentialité et l'information obtenue par les commissions au moyen d'une enquête est confidentielle. Enfin, même si la *Loi sur les valeurs mobilières* (Québec) et la *Loi sur les valeurs*

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[19] L.R.Q., ch. V-1.1.

mobilières (Ontario) ne le prévoient pas expressément, la CVMQ et la CVMO ne considèrent pas que l'information fournie volontairement est de nature confidentielle. L'information fournie volontairement peut être échangée sans formalités[20].

(ii) États-Unis

Les lois[21] sur les valeurs mobilières des États-Unis sont similaires à celles du Québec et de l'Ontario en ce que les sociétés ouvertes sont assujetties à certaines règles de divulgation de l'information. L'information obtenue au moyen du régime de l'information continue est publique. La *Securities and Exchange Commission* (la « **SEC** ») est, tout comme la CVMO et la CVMQ, autorisée à mener les enquêtes qu'elle juge nécessaires pour déterminer si une personne a enfreint les lois sur les valeurs mobilières ou d'autres lois connexes[22]. De plus, à la demande d'une autorité étrangère, la SEC peut fournir de l'assistance. Comme au Québec et en Ontario, en vertu de la règle 0-4 des *General Rules and Regulations promulgated under the Securities Exchange Act 1934* (les « **règlements américains** »), à moins de faire partie du dossier public, toute l'information et tous les documents obtenus par la SEC dans le cadre d'une enquête sont réputés confidentiels. Tous les employés et tous les cadres sont tenus de préserver la confidentialité de tous les renseignements à moins que la SEC n'autorise leur divulgation au motif que cela n'est pas contraire à l'intérêt public.

De plus, même si un émetteur assujetti est astreint aux exigences prévues en matière d'information continue, la règle 0-6 des règlements américains prévoit que certains renseignements peuvent être privilégiés (c'est-à-dire confidentiels) si l'on estime que cette protection est dans l'intérêt de la défense nationale ou de la politique étrangère. Comme au Québec et en Ontario, lorsqu'elle dépose une information qu'elle est tenue de divulguer en vertu des règles relatives à l'information continue, une société peut exiger que la confidentialité de cette information soit préservée.

Comme la CVMQ et la CVMO, la SEC détient de nombreux documents publics concernant les sociétés assujetties aux exigences d'information prévues dans la *U.S. Securities Act*. La SEC ainsi

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[20] *Infra*, page 18, « En pratique ».

[21] Aux États-Unis, plusieurs lois régissent le secteur des valeurs mobilières. Pour les fins du présent rapport, ainsi qu'il a été mentionné, la loi pertinente est la *Securities Exchange Act* 1934.

[22] Article 21, *U.S. Securities Act*.

que la CVMQ et la CVMO détiennent aussi de l'information et des dossiers qui sont considérés non accessibles au public, en ce qu'ils ne sont pas mis à la disposition du public pour qu'il les consulte ou les photocopie. Les documents non publics ne peuvent être divulgués qu'à certaines personnes et dans certaines circonstances dont il sera question plus loin.

(iii) Protocole d'entente

Le 7 janvier 1988, la SEC, la CVMO, la CVMQ et la Commission des valeurs mobilières de la Colombie-Britannique (« **CVBC** ») ont signé une entente (l'« **entente** »)[23] concernant les demandes d'assistance relativement à l'administration et à l'application des lois sur les valeurs mobilières américaines et canadiennes.

L'entente prévoit que les autorités[24] se fourniront l'une à l'autre l'assistance mutuelle la plus entière « en vue de faciliter l'exécution des fonctions de surveillance du marché des valeurs mobilières et la conduite d'enquêtes, de procédures ou de poursuites dans les cas où une information située dans le territoire de l'autorité requise est nécessaire pour déterminer s'il y a eu contravention aux lois ou règlements de l'autorité requérante, ou pour prouver une telle contravention »[25]. L'entente a pour but d'établir et de confirmer l'importance de l'assistance mutuelle. L'entente n'expose pas exhaustivement toutes les formalités à suivre dans le cadre de l'échange d'information. Des renseignements sont aussi échangés de manière informelle sans se reporter à quelque loi ou convention que ce soit. En fait, le paragraphe 1 de l'article 3 de l'entente prévoit que la signature de l'entente n'empêche pas les parties de prendre d'autres mesures que celles qui y sont prévues pour tenter d'obtenir de l'information, des témoignages ou des documents situés sur le territoire d'une autre partie. L'assistance à fournir aux termes de l'entente comprend les éléments suivants : fournir accès à l'information contenue dans les dossiers de l'autorité requise, recueillir des témoignages et obtenir des documents auprès de tiers[26].

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[23] Bulletin de la CVMO, vol. II, n° 2, 15 janvier 1988. Une copie de l'entente est jointe aux présentes en annexe A.
[24] Au sens de l'entente, le mot « autorité » s'entend de la SEC, de la CVMO, de la CVMQ et de la CVBC.
[25] Paragraphe 1 de l'article 2 de l'entente.
[26] Paragraphe 2 de l'article 2 de l'entente.

(iv) Renseignements confidentiels

Le paragraphe 1 de l'article 7 de l'entente prévoit que les parties doivent préserver la confidentialité du contenu de toute demande présentée aux termes de l'entente, de l'information recueillie en réponse à une demande ainsi que de toute autre question reliée à l'entente, dans la mesure permise par la loi, sauf pour ce qui est des divulgations qui sont « absolument nécessaires » pour donner suite à la demande. Cette disposition prévoit aussi que les parties peuvent d'un commun accord renoncer à cette confidentialité. Les parties à l'entente s'engagent en outre à ne pas offrir cette information à un tiers et à faire de leur mieux pour s'assurer qu'elle ne soit pas obtenue par un tiers[27].

(v) Utilisation permise des renseignements

L'entente prévoit les fins pour lesquelles l'information obtenue peut être utilisée. Premièrement, l'information peut être utilisée aux fins indiquées dans la demande en vue d'assurer le respect ou l'application des lois ou règlements sur les valeurs mobilières. Deuxièmement, l'information peut être utilisée pour les fins qui entrent dans le cadre général de l'utilisation indiquée dans la demande, notamment la conduite d'une instance civile ou administrative en matière d'application, l'assistance dans le cadre d'une instance d'un organisme d'autoréglementation en matière d'application ou la conduite de toute enquête reliée à de telles procédures[28]. En fait, les dispositions relatives à la confidentialité de l'entente prévoient une exception à la règle relative à la divulgation de l'information à des tiers si cette divulgation relève des utilisations permises ci-dessus. Par conséquent, l'information ne restera pas confidentielle si elle est nécessaire dans le cadre d'une instance civile ou administrative en matière d'application ou à l'égard d'une poursuite criminelle.

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[27] Paragraphe 3 de l'article 7 de l'entente. De plus, l'entente prévoit que si un tiers obtient une information, la personne requérante fera de son mieux pour s'assurer que cette information ne soit pas divulguée par ce tiers à une autre personne.

[28] Paragraphe 1 de l'article 6 de l'entente.

C. Cheminement des renseignements – Demandes, réponses et dispositions

(i) Québec et Ontario

Au Québec, toutes les enquêtes menées en vertu de l'article 239 de la *Loi sur les valeurs mobilières* (Québec) se déroulent à huis clos. De plus, en vertu de l'article 245 de cette loi, la CVMQ peut interdire à une personne de divulguer tout renseignement se rapportant à une enquête. La confidentialité constitue la règle et ce n'est qu'avec l'autorisation de la CVMQ que les rapports d'enquête peuvent être divulgués[29]. En Ontario, la CVMO ne peut divulguer des renseignements confidentiels à des personnes qu'en vertu d'une ordonnance rendue aux termes de l'article 17 de la *Loi sur les valeurs mobilières* (Ontario). Cette disposition confère à la CVMO le pouvoir de décider si elle doit divulguer ou non des renseignements confidentiels. En vertu de cette disposition, la CVMO peut ordonner la divulgation de l'information confidentielle si cette divulgation sert l'intérêt public[30].

Tant dans la *Loi sur les valeurs mobilières* (Ontario) que dans la *Loi sur les valeurs mobilières* (Québec), il est prévu que la commission des valeurs mobilières en cause peut ordonner une enquête pour l'aider à l'administration de la loi sur les valeurs mobilières de la province ou de celle d'une autre autorité législative. Plus détaillée que la *Loi sur les valeurs mobilières* (Québec), la *Loi sur les valeurs mobilières* (Ontario) prévoit, à son article 11, que l'enquête peut concerner les affaires de personne ou de sociétés, notamment les opérations, les négociations, les transactions, les prêts ou les paiements les concernant, ainsi que l'actif, le passif, les dettes ou les obligations existant en tout temps.

La *Loi sur les valeurs mobilières* (Ontario) prévoit que l'information obtenue dans le cadre d'une enquête, y compris la teneur de l'ordonnance de la CVMO décrivant l'enquête ainsi que les témoignages de tous les témoins, ne doit pas être divulguée par quelque personne ou société que ce

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[29] Article 297 de la *Loi sur les valeurs mobilières* du Québec.

[30] La *Loi sur les valeurs mobilières* (Ontario) ne définit pas l'intérêt public. Un représentant de la CVMO nous a informés que c'est au cas par cas qu'on décide si une divulgation dessert ou non l'intérêt public.

soit[31]. Ainsi qu'il a déjà été souligné, l'article 17 de la *Loi sur les valeurs mobilières* (Ontario) prévoit que l'information peut être divulguée si la CVMO estime qu'il est dans l'intérêt public de le faire. Pour déterminer s'il est dans l'intérêt public de divulguer une certaine information, la CVMO doit donner aux parties intéressées un avis de la divulgation éventuelle ainsi que l'occasion d'être entendues à cet égard[32]. En vertu de l'article 245 de la *Loi sur les valeurs mobilières* (Québec), la CVMQ peut interdire à une personne de divulguer de l'information concernant une enquête à quiconque, sauf à son avocat. De plus, la CVMQ peut déclarer que le public ne peut avoir accès à un document s'il peut en résulter un préjudice grave[33]. Enfin, ainsi qu'il a été souligné, les rapports d'enquête et les rapports d'inspection ne peuvent être obtenus qu'avec l'autorisation de la CVMQ[34].

En Ontario, par conséquent, l'information qui est confidentielle peut être divulguée en vertu d'une ordonnance si la CVMO estime qu'il est dans l'intérêt public de le faire. L'ordonnance prévoit à qui l'information doit être divulguée et, si cela est jugé opportun, les modalités et conditions devant assortir la divulgation[35]. Au Québec, toutes les enquêtes se déroulent à huis clos et sont, en tant que tel, confidentielles, et l'information obtenue dans le cadre de celles-ci ne peut être consultée qu'avec l'autorisation de la CVMQ.

Tant la *Loi sur les valeurs mobilières* (Québec) que la *Loi sur les valeurs mobilières* (Ontario) prévoient qu'une enquête peut être tenue afin d'aider à l'administration de la législation sur les valeurs mobilières d'une autre autorité législative. Par conséquent, sur réception d'une demande d'information provenant d'une autre autorité législative[36], chaque commission des valeurs mobilières concernée décidera si elle fera ou non enquête sur cette question. Une fois qu'elle a décidé d'agir et qu'elle a procédé à l'enquête, l'information peut être divulguée à l'autorité étrangère requérante. En Ontario, il faut une ordonnance de divulgation aux termes de l'article 17 de la *Loi sur les valeurs mobilières* (Ontario) et, au Québec, il faut une autorisation de divulgation aux termes de

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[31] Article 15 de la *Loi sur les valeurs mobilières* (Ontario). Toutefois, l'information peut être divulguée à l'avocat de la personne ou de la société concernée.

[32] Article 17 de la *Loi sur les valeurs mobilières* (Ontario).

[33] Article 296 de la *Loi sur les valeurs mobilières* (Québec).

[34] Article 297 de la *Loi sur les valeurs mobilières* (Québec).

[35] Article 17 de la *Loi sur les valeurs mobilières* (Ontario).

[36] Ni la *Loi sur les valeurs mobilières* (Québec) ni la *Loi sur les valeurs mobilières* (Ontario) ne prévoient de règles régissant la forme des demandes qui doivent être présentées lorsque l'État requérant exige de l'information publique ou de l'information qui nécessite une enquête. Ces détails sont prévus dans l'entente.

l'article 297 de la *Loi sur les valeurs mobilières* (Québec). Dans les deux territoires, l'information obtenue dans le cadre d'une enquête est réputée confidentielle et c'est la commission des valeurs mobilières qui décide si cette information doit, en fait, être divulguée, indépendamment de la question de savoir si le destinataire de la divulgation est une autorité étrangère. L'information qui est publique, c'est-à-dire toute l'information divulguée par une société aux termes des règles de l'information continue, peut être fournie à qui que ce soit.

Il est important de souligner que le pouvoir de tenir des enquêtes, des audiences, de convoquer des témoins, etc. a été conféré à la CVMQ et à la CVMO. Ces dernières exercent des pouvoirs similaires aux pouvoirs d'enquête des tribunaux. Si une personne omet d'obtempérer à une ordonnance de production de documents, la CVMQ et la CVMO peuvent s'adresser à la cour pour obtenir la délivrance d'une citation pour outrage contre cette personne. En pratique, nous avons été informés que la simple menace de recours aux tribunaux suffit pour motiver la personne en cause à obtempérer à la demande que lui adresse la commission des valeurs mobilières.

La CVMQ et la CVMO recueillent aussi de l'information sur les sociétés dont une partie est publique et une autre partie est « semi publique »[37]. Même si la *Loi sur les valeurs mobilières* (Québec) et la *Loi sur les valeurs mobilières* (Ontario) ne le prévoient pas expressément, la CVMQ et la CVMO disposent dans leur dossier d'autres renseignements sur les sociétés tels que des articles qui ont été écrits au sujet d'une société (lesquels sont publics), l'état de l'enregistrement (lequel est semi public) ainsi que d'autres renseignements qui ont été recueillis, lesquels ne sont pas nécessairement publics. Cette information « semi publique » est apparemment échangée avec les commissions d'autres territoires de manière non officielle[38].

Lorsqu'il s'agit de demandes précises d'information, le mode d'échange de l'information est prévu dans l'entente. Toutefois, les commissions des valeurs mobilières ont établi des ententes non officielles pour divulguer et échanger d'autres renseignements publics ou semi-publics.

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[37] L'expression « information semi publique » est employée par la CVMO pour désigner l'information à laquelle le public peut avoir accès moyennant des frais.

[38] *Infra*, page 25, « En pratique ».

(ii) États-Unis

La *U.S. Securities Act* est plus détaillée que la *Loi sur les valeurs mobilières* (Québec) et la *Loi sur les valeurs mobilières* (Ontario) pour ce qui est des conditions de divulgation de l'information confidentielle. Les dossiers sur les sociétés que détient la SEC et qui sont réputés non publics peuvent être divulgués conformément à la règle 24c-1 des règlements américains. Aux termes de cette disposition, la SEC peut, à son gré, divulguer cette information si la personne qui la reçoit fournit des garanties de préservation de son caractère confidentiel. Les règlements américains limitent la divulgation à certaines personnes, notamment au gouvernement (fédéral, États, administration locale ou pays étranger) et à ses organes, à un syndic de faillite, à un organisme d'autoréglementation, à une autorité de réglementation financière étrangère, à un barreau, à une association professionnelle, ainsi qu'à tout membre de ceux-ci. La SEC a toujours le pouvoir discrétionnaire de refuser de divulguer l'information, et ce, même si la partie requérante établit la nécessité de les obtenir[39].

De plus, ainsi qu'il a déjà été mentionné, même si la règle 0-4 des règlements américains prévoit que toute l'information ou tous les documents obtenus par des cadres ou des employés de la SEC au cours d'une enquête sont réputés confidentiels, la SEC pourrait autoriser leur divulgation au motif que celle-ci n'est pas contraire à l'intérêt public.

La SEC est aussi autorisée à divulguer des dossiers confidentiels[40] à de telles personnes, à l'étranger ou au pays, selon ce que la SEC juge approprié, à la condition que la personne recevant l'information fournisse des garanties de préservation de leur confidentialité.

L'article 21 de la *U.S. Securities Act* prévoit qu'une autorité étrangère peut demander à la SEC de l'assistance en vue d'obtenir de l'information sur une personne soupçonnée d'avoir enfreint les lois de l'autorité étrangère. La demande est présentée par écrit à la SEC. Une fois la demande reçue, la SEC décide si elle mènera ou non une enquête pour recueillir l'information demandée. Pour

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[39] Alinéa C de la règle 24c-1 du Règlement.

[40] Ces dossiers incluent l'ensemble des demandes, des déclarations, des rapports, des contrats, des lettres, des avis et des autres documents déposés auprès de la commission ou obtenus par celle-ci. Article 24 de la *U.S. Securities Act*.

décider si elle doit fournir l'assistance demandée, la SEC examine si l'autorité requérante a convenu de fournir une assistance mutuelle à la SEC à l'égard de questions relatives aux valeurs mobilières et si le fait de donner suite à la demande porterait préjudice à l'intérêt public des États-Unis[41].

Une fois que la SEC a décidé qu'elle fournira l'assistance demandée, chaque membre de la SEC, lorsqu'il procède à une enquête, se voit conférer le pouvoir de faire prêter serment, d'assigner des témoins à comparaître, de les contraindre à comparaître ou d'exiger la production de dossiers qui peuvent être jugés pertinents pour les fins de l'enquête. Une fois obtenue, l'information peut alors être transmise à l'autorité requérante.

Comme au Québec et en Ontario, par conséquent, l'information obtenue par la SEC conformément aux dispositions relatives à l'information continue peut être fournie à toute personne, puisqu'elle fait partie du dossier public. Les autres renseignements obtenus dans le cadre d'une enquête qui sont réputés confidentiels peuvent être échangés avec des autorités étrangères ou nationales si la SEC est assurée que ces renseignements demeureront confidentiels. De plus, la *U.S. Securities Act* prévoit, comme la *Loi sur les valeurs mobilières* (Ontario) et la *Loi sur les valeurs mobilières* (Québec), que la SEC peut aider une autorité étrangère à obtenir des renseignements. Certaines formalités doivent être suivies et il appartient à la SEC de décider si une aide sera ou non fournie. Une fois que l'aide est fournie, la SEC décide si les renseignements peuvent ou non être divulgués à l'autorité requérante.

(iii) Protocole d'entente

Toutes les demandes d'assistance aux termes de l'entente doivent être présentées par écrit[42]. La demande doit fournir une description générale de l'information, des documents ou des témoignages demandés, le but de la demande, les personnes censées posséder l'information, le lieu où l'information peut être obtenue, les dispositions de loi concernant l'objet de la demande et le délai de réponse[43]. Il n'est pas nécessaire d'obtenir la permission d'une commission des valeurs mobilières ou d'un tribunal pour présenter une demande.

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[41] Sous-alinéa 21(a)(2) de la U.S. Securities Act.
[42] Paragraphe 1 de l'article 4 de l'entente.
[43] Paragraphe 2 de l'article 4 de l'entente.

Malgré ce qui précède, l'alinéa 2a) de l'article 2 de l'entente prévoit que les demandes relatives à une information pouvant être obtenue de sources publiques peuvent être présentées de manière non officielle sans qu'il soit nécessaire de disposer d'entente écrite[44]. En fait, telle est la pratique de la SEC, de la CVMQ et de la CVMO à l'égard de l'échange d'information publique.

L'entente prévoit aussi que les parties doivent faire de leur mieux pour échanger l'information qui est portée à leur attention et qu'elles estiment être dans l'intérêt de l'autre partie pour ce qui est de la violation réelle ou anticipée des lois de celle-ci. Cette disposition de l'entente (paragraphe 1 de l'article 9) à l'égard de l'assistance non sollicitée confirme l'intention des parties de travailler de concert. L'autorité requise peut refuser l'assistance pour un motif lié à l'intérêt public[45].

Sur réception d'une demande écrite, la commission des valeurs mobilières requise décidera si l'assistance demandée sera ou non fournie. Si la commission des valeurs mobilières requise décide qu'elle procédera à une enquête, les règles concernant les enquêtes prévues dans sa loi sur les valeurs mobilières s'appliquent. Ainsi qu'il a déjà été mentionné, ces règles accordent à chacune des commissions de valeurs mobilières les pouvoirs d'un tribunal pour la tenue d'audiences. Une fois que l'enquête est terminée et que l'information est obtenue, la commission des valeurs mobilières requise décidera si l'information peut être transmise ou non à l'autorité requérante. Il est possible qu'une fois l'information obtenue, l'on décide qu'elle ne devrait pas être transmise pour un motif lié à l'intérêt public.

(iv) En pratique

L'esprit de l'entente en est un d'échange, de coopération et d'assistance mutuelle la plus entière qu'il est possible en pratique. L'un des aspects les plus importants de l'entente est la confirmation de la notion d'échange et d'assistance mutuelle. L'entente n'a pas été rédigée pour prévoir l'ensemble des formalités nécessaires à l'échange d'information mais plutôt pour confirmer

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[44] *Infra*, page 18, « En pratique ».

[45] Paragraphe 4 de l'article 3 de l'entente. L'entente ne définit pas la notion d'intérêt public. Un représentant de la CVMO nous a informés qu'il n'y avait pas de critères officiels servant à déterminer si une chose est d'intérêt public. Cette décision est prise au cas par cas. Par exemple, si une enquête a été entreprise par l'autorité requise, il se peut qu'elle décide qu'il ne convient pas de fournir une assistance.

l'intention des parties. En conséquence, nous avons été informés que toutes les commissions de valeurs mobilières qui sont parties à l'entente s'efforcent d'être aussi utiles que possible pour ce qui est de l'échange d'information.

Il n'y a apparemment aucun groupe ni aucune division spéciale au sein des commissions des valeurs mobilières qui traite des échanges d'information. Lorsque, dans le cadre de son travail, l'employé d'une commission des valeurs mobilières est mis au courant d'une information qui l'amène à croire qu'une enquête ou une information est requise, il peut appeler son vis-à-vis de la commission des valeurs mobilières en cause ou rédiger une demande écrite qui est transmise, apparemment sans autre formalité, à cette commission des valeurs mobilières. L'autorisation de la commission des valeurs mobilières est requise pour présenter une demande d'information verbale ou écrite. Il est à souligner qu'une commission peut entreprendre sa propre enquête en fonction de l'information découverte par suite d'une demande présentée par une autorité étrangère. Les commissions de valeurs mobilières utilisent souvent des documents photocopiés, de sorte que l'information peut être facilement échangée avec l'autorité étrangère tandis que les documents originaux sont conservés pour les fins de sa propre enquête.

Aux États-Unis, ainsi qu'il a déjà été mentionné, la SEC s'est vue conférer de larges pouvoirs d'enquête sur d'éventuelles violations des lois sur les valeurs mobilières américaines ainsi que des lois sur les valeurs mobilières étrangères. Lorsqu'une enquête est non officielle, les employés mènent l'enquête sans autorisation de la part de la SEC, c'est-à-dire que les employés peuvent demander que des renseignements leur soient communiqués volontairement. Si la tenue d'une enquête officielle est requise, les employés peuvent recourir aux pouvoirs d'assignation à comparaître conférés à la SEC pour contraindre des témoins à témoigner ou à produire des livres, des registres ou tout autre élément de preuve.

Il existe apparemment plusieurs types d'information qui peuvent être demandés et échangés :

1. L'autorité étrangère peut demander de l'information qui est publique ou semi publique. Il s'agit d'une information qui est versée au dossier des commissions des valeurs mobilières, ce qui peut inclure des articles écrits au sujet d'une société ouverte donnée. La demande est présentée d'une manière non officielle, c'est-à-dire habituellement verbalement, et l'information est fournie sans autre formalité.

2. L'autorité étrangère peut demander de l'information qui figure au dossier des commissions des valeurs mobilières. Il s'agit d'une information que la commission des valeurs mobilières recueille dans le cours normal de ses activités, comme l'état d'enregistrement d'un inscrit, son adresse, etc. Cette information n'est pas publique en ce qu'elle n'a pas été divulguée aux termes des dispositions relatives à l'information continue de la loi sur les valeurs mobilières applicable. Il est donné suite à la demande visant ces types d'information sans autre formalité.

3. L'autorité étrangère peut demander de l'information provenant d'un dossier de l'enquête en cours, c'est-à-dire que l'autorité étrangère est informée qu'une enquête sur une société particulière est en cours et qu'elle aimerait obtenir de l'information s'y rapportant. Dans un tel cas, il existe deux scénarios possibles. La première possibilité est que l'information demandée fasse partie de l'information qui a été fournie volontairement à la commission des valeurs mobilières dans le cadre de son enquête. Cette information fournie volontairement est échangée sans autre formalité[46]. La deuxième possibilité est que l'information demandée fasse partie de l'information qui n'a pas été fournie volontairement dans le cours de l'enquête, mais que la commission des valeurs mobilières a dû obtenir par contrainte. Dans un tel cas, pour

[46] Les représentants des commissions ont mentionné que le fait que de l'information fournie volontairement soit échangée sans autre formalité n'a pas d'incidence sur la question de savoir si les personnes en cause acceptent de fournir volontairement de l'information. Certaines personnes souhaitent fournir de l'information volontairement tandis que d'autres ne le souhaitent pas.

fournir cette information, la commission des valeurs mobilières doit rendre une ordonnance de divulgation de cette information à l'autorité étrangère, c'est-à-dire que cette information fait partie de l'information confidentielle qui ne peut être échangée que par ordonnance de la commission, c'est-à-dire aux termes d'une ordonnance rendue en vertu de l'article 17 en Ontario.

4. Le quatrième et dernier scénario est le cas d'une autorité étrangère qui demande que la commission des valeurs mobilières obtienne une information qu'elle ne possède pas; cette dernière doit donc procéder à une enquête pour l'obtenir. Dans un tel cas, la demande doit être présentée par écrit et établie dans la forme prévue dans l'entente[47]. Sur réception de la demande, la commission des valeurs mobilières procédera à une enquête conformément aux dispositions de sa loi. Par conséquent, au Québec, l'enquête est effectuée aux termes de l'article 239 de la *Loi sur les valeurs mobilières* (Québec) et, en Ontario, aux termes de l'article 11 de la *Loi sur les valeurs mobilières* (Ontario). Une fois l'enquête terminée et l'information obtenue, la commission décidera si cette information doit ou non être transmise à l'autorité étrangère[48].

Ainsi qu'il a été souligné ci-dessus, lorsqu'est échangée une information réputée confidentielle, il est possible que son utilisation soit assortie de conditions. Par exemple, l'article 17 de la *Loi sur les valeurs mobilières* (Ontario) prévoit que la CVMO peut assortir la transmission d'une information de certaines modalités et conditions. Ainsi, l'information pourrait être échangée pour une fin déterminée seulement.

Enfin, pour ce qui est du traité d'entraide juridique dont il a été question ci-dessus, même si celui-ci prévoit expressément qu'il s'applique pour l'assistance en matière de valeurs mobilières, il n'est pas souvent employé à cet égard. Le traité d'entraide juridique se limite aux affaires criminelles en matière de valeurs mobilières qui ne surviennent pas aussi souvent que les affaires réglementaires. Par conséquent, même s'il est possible d'avoir recours au traité d'entraide juridique pour obtenir de

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[47] L'entente prévoit que, dans les situations d'urgence, il n'est pas nécessaire que la demande soit présentée par écrit.

[48] En Ontario, il faudrait qu'une ordonnance soit rendue en vertu de l'article 17 de la *Loi sur les valeurs mobilières* (Ontario).

l'information et de l'assistance, l'assistance et l'information échangées sont habituellement obtenues en vertu de l'entente et des pouvoirs conférés en vertu des lois sur les valeurs mobilières. Naturellement, en cas de recours au traité d'entraide juridique, les formalités d'obtention de l'assistance sont les mêmes que celles qui sont prévues ci-dessus.

Ainsi qu'il a été souligné ci-dessus, l'esprit de l'entente en est un d'assistance et de coopération. Par conséquent, même si l'information demandée est entre les mains d'un autre organisme gouvernemental, c'est-à-dire qu'elle n'est pas entre les mains de la commission des valeurs mobilières, la commission des valeurs mobilières requise fera apparemment de son mieux pour les obtenir pour la commission requérante[49].

Toutefois, il n'est pas nécessaire que le représentant d'une commission obtienne l'autorisation de la commission des valeurs mobilières ou d'un juge pour présenter une demande d'information. L'autorisation de la commission des valeurs mobilières est nécessaire pour entreprendre une enquête et déterminer si une information non publique obtenue dans le cadre d'une enquête sera, en fait, divulguée.

Demandes de la CVMQ ou la CVMO adressées à la SEC

La CVMQ et la CVMO peuvent, sans obtenir une autorisation judiciaire au préalable, demander des renseignements à la SEC. Voici quels sont les scénarios possibles à cet égard :

- présenter une demande de renseignements ou échanger des renseignements lorsque la SEC dispose de tels renseignements et que ces derniers revêtent un caractère public ou semi-public;

- présenter une demande de renseignements ou échanger des renseignements lorsque la SEC dispose de tels renseignements et que ces derniers lui ont été fournis sur une base volontaire ou qu'elle les a obtenus dans le cadre normal de ses activités;

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[49] Nous avons été informés que la CVMO traite [TRADUCTION] « d'un certain nombre de demandes chaque mois ». Le nombre exact des demandes n'a pas été divulgué. De plus, les commissions n'ont pas voulu nous indiquer le nombre de demandes d'information qui ont été rejetées.

- présenter une demande de renseignements ou échanger des renseignements lorsque la SEC a dû exercer une contrainte pour obtenir ceux-ci[50];

- présenter une demande de renseignements ou échanger des renseignements lorsque la SEC doit faire enquête pour obtenir les renseignements[51].

Demandes de la SEC adressées à la CVMQ et à la CVMO

La SEC peut demander à la CVMQ ou à la CVMO de lui communiquer des renseignements, et ces dernières n'ont pas à obtenir une autorisation judiciaire pour accéder à la demande. Voici quelques sont les scénarios possibles à cet égard :

- présenter une demande de renseignements ou échanger des renseignements lorsque la CVMQ ou la CVMO dispose de tels renseignements et que ces derniers revêtent un caractère public ou semi-public;

- présenter une demande de renseignements ou échanger des renseignements lorsque la CVMQ ou la CVMO dispose de tels renseignements et que ces derniers ont été fournis sur une base volontaire ou ont été obtenus dans le cadre normal des activités;

- présenter une demande de renseignements ou échanger des renseignements lorsque la CVMQ ou la CVMO a dû exercer une contrainte pour obtenir ceux-ci[52];

- présenter une demande de renseignements ou échanger des renseignements lorsque la CVMQ ou la CVMO doit faire enquête pour obtenir les renseignements[53].

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50 Il n'est jamais nécessaire d'obtenir une autorisation judiciaire pour échanger des renseignements, mais les commissions des valeurs mobilières doivent autoriser l'échange avant qu'il n'ait lieu.

51 *Supra*, note en bas de page 1.

52 Il n'est jamais nécessaire d'obtenir une autorisation judiciaire pour échanger des renseignements, mais les commissions des valeurs mobilières doivent autoriser l'échange avant qu'il n'ait lieu.

53 *Supra*, note en bas de page 1.

D. Sanctions

(i) Québec et Ontario

Les sanctions pour divulgation d'une information confidentielle par un membre de la commission des valeurs mobilières sont prévues dans les règles internes de la commission des valeurs mobilières et consistent en mesures disciplinaires. Si une autorité étrangère divulgue une information confidentielle qui lui a été fournie sous pli confidentiel par une commission des valeurs mobilières, cette dernière ne dispose d'aucun pouvoir pour pénaliser l'autorité étrangère, que ce soit suivant ses règles internes ou la loi sur les valeurs mobilières qu'elle applique. Refuser toute aide ultérieure est la seule « sanction » possible.

En Ontario, l'article 141 de la *Loi sur les valeurs mobilières* prévoit qu'aucune action en responsabilité civile ne peut être intentée contre la Commission des valeurs mobilières de l'Ontario ou l'un de ses membres relativement à un acte accompli de bonne foi.

En outre, suivant le paragraphe 17(3) de cette loi, une preuve testimoniale ne peut être communiquée à la police ou à une personne responsable de l'application du droit criminel au Canada qu'avec le consentement écrit de l'auteur du témoignage. Cette disposition ne s'applique pas aux renseignements obtenus d'une autorité étrangère en réponse à une demande. Bien que ce ne soit pas interdit, il est improbable que la Commission des valeurs mobilières de l'Ontario communique de tels renseignements, car cela pourrait compromettre les bonnes relations établies avec l'autorité étrangère. En conséquence, les renseignements obtenus dans le cadre d'une enquête ne seront utilisés qu'à des fins civiles.

(ii) États-Unis

La *U.S. Securities Act* prévoit, à son article 21, des sanctions administratives qui peuvent être imposées à la SEC si elle obtient des dossiers ou des renseignements que ceux-ci renferment en contravention des règles d'obtention de tels renseignements[54]. De plus, comme au Québec et en

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[54] L'article 21 de la *U.S. Securities Act* prévoit que les dossiers financiers ne peuvent être obtenus qu'au moyen d'assignation à comparaître délivrée par une cour de district des États-Unis à la suite d'une audience *ex parte*.

Ontario, des mesures disciplinaires peuvent être prises à l'égard des employés de la SEC qui dévoilent des renseignements confidentiels.

Comme mentionné précédemment, étant donné que ni les autorités des États-Unis ni celles du Canada ne peuvent infliger des sanctions à une autorité étrangère, le refus d'assister l'autorité étrangère qui a enfreint la confidentialité est la seule « sanction » qui puisse être imposée.

(iii) Protocole d'entente

L'entente renferme un article qui traite des différends[55]. Même si cette disposition ne mentionne pas expressément la violation de la confidentialité, il est concevable qu'elle s'applique tout de même. De plus, lorsqu'une partie constate qu'une autre partie enfreint constamment les règles de confidentialité prévues dans l'entente, cette dernière pourrait être résiliée[56].

E. Garanties

(i) Québec et Ontario

La *Loi sur les valeurs mobilières* (Québec) prévoit que la CVMQ peut interdire à une personne de divulguer de l'information concernant une enquête[57]. De même, en Ontario, l'information qui est confidentielle (soit en général l'information obtenue dans le cadre d'une enquête) peut être divulguée sur ordonnance de la CVMO[58], et la *Loi sur les valeurs mobilières* (Ontario) prévoit en outre que la CVMO peut assujettir cette divulgation à des modalités et à des conditions, c'est-à-dire qu'elle peut préciser que l'information ne peut être utilisée qu'à une fin déterminée. Hormis ce qui précède, la *Loi sur les valeurs mobilières* (Québec) et la *Loi sur les valeurs mobilières* (Ontario) ne prévoient pas d'autres mesures de protection pour garantir l'usage approprié de l'information confidentielle.

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55 Article 8 de l'entente.
56 Article 13 de l'entente.
57 Article 239 de la *Loi sur les valeurs mobilières* (Québec).
58 Article 17 de la *Loi sur les valeurs mobilières* (Ontario).

(ii) États-Unis

Suivant la *U.S. Securities Act*, toute l'information non publique, ainsi que l'information obtenue dans le cadre d'une enquête, sont confidentielles. Elles peuvent toutefois être communiquées moyennant des garanties suffisantes quant au respect de leur confidentialité. Il appert en fait que la SEC n'autorisera pas la communication de renseignements confidentiels si elle n'est pas assurée convenablement du respect de leur confidentialité.

(iii) Protocole d'entente

L'entente prévoit que toute information échangée sous son régime l'est sur une base confidentielle. De plus, elle limite l'usage de l'information échangée à certaines fins précises déjà mentionnées.

(iv) En pratique

En pratique, il n'est pas facile de surveiller l'utilisation de l'information fournie à une autorité étrangère. Même si une commission a assujetti l'utilisation de cette information à des modalités et à des conditions, il demeure possible qu'une autorité étrangère utilise cette information sans respecter ces modalités et ces conditions. Manifestement, la garantie la plus sûre est que chacune des commissions des valeurs mobilières reconnaisse la nécessité d'une assistance continue et de l'échange de renseignements, de sorte qu'elle hésite à compromettre l'obtention ultérieure d'une assistance ou d'un renseignement en dévoilant ou en utilisant abusivement un renseignement confidentiel qui lui a été communiqué.

4. RÉGIME FISCAL

A. Introduction

La présente partie fait état des règles qui régissent l'entraide et l'échange de renseignements en matière fiscale entre les États-Unis et le Canada. Les règles canadiennes figurent dans la *Loi de l'impôt sur le revenu*[59] (la « LIR »), les règlements et la Convention fiscale entre le Canada et les États-Unis d'Amérique[60] (la « **Convention Canada-É.-U.** »). Les règles américaines sont énoncées dans l'*Internal Revenue Code* (le « Code »), les règlements et la Convention Canada-É.-U..

B. Renseignements confidentiels

(i) Droit canadien

L'exercice des pouvoirs d'enquête nationaux dans un contexte international est principalement limité par les dispositions relatives à la confidentialité de l'article 241 de la LIR, qui interdit expressément la communication de renseignements sur le contribuable obtenus par Revenu Canada, sauf dans certaines circonstances précises. Par conséquent, en l'absence d'un pouvoir exprès, Revenu Canada ne peut communiquer de renseignements à un État étranger. Suivant la LIR, l'information relative au contribuable est réputée constituer un renseignement confidentiel. Le paragraphe 241(10) de la LIR définit le «renseignement confidentiel» comme un «[r]enseignement de toute nature et sous toute forme concernant un ou plusieurs contribuables et qui, selon le cas, *a)* est obtenu par le ministre ou en son nom pour l'application de la LIR ou *b)* est tiré d'un renseignement visé à l'alinéa *a)*»; cependant «[n]'est pas un renseignement confidentiel le renseignement qui ne révèle pas, même indirectement, l'identité du contribuable en cause». Les documents et les renseignements fournis à Revenu Canada sur une base volontaire en contrepartie de l'engagement d'en assurer la confidentialité ne peuvent servir à d'autres fins que celles pour lesquelles ils ont été obtenus. Dans l'affaire *Crestbrook Forest Industries Ltd. c. La Reine*[61], Revenu Canada avait obtenu des documents et des renseignements dans le cadre d'une enquête portant sur

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59 L.R.C. (1985), ch. 1 (5e suppl.), modifiée (y compris les modifications en cours).

60 *Convention entre le Canada et les États-Unis d'Amérique en matière d'impôts sur le revenu et sur la fortune* signée le 26 septembre 1980 et modifiée par les Protocoles signés le 14 juin 1983, le 28 mars 1984, le 17 mars 1995 et le 29 juillet 1997, édictée au Canada dans S.C. 1984, ch. 20, modifiée dans L.C. 1995, ch. 34, L.C. 1997, ch. 38, dont le texte est joint à l'annexe C.

61 92 DTC 6187 (C.A.F.)

la pâte à papier et le papier journal. L'objet de l'enquête était de déterminer une fourchette raisonnable d'escomptes et de commissions consentis sur les prix à l'exportation de la pâte à papier et du papier journal. Les données de l'enquête devaient servir de point de départ aux discussions bilatérales entre Revenu Canada et l'Internal Revenue Service des États-Unis en vue de l'élaboration de règles applicables aux sociétés exerçant leurs activités dans ce domaine. Le rapport d'enquête confirmait le caractère confidentiel des renseignements et que ceux-ci étaient obtenus en contrepartie de l'engagement qu'ils soient tenus confidentiels. La Cour d'appel fédérale a statué que lorsque la Couronne obtient à titre confidentiel des renseignements fournis par des contribuables de leur plein gré et dans un but précis, elle ne peut les utiliser à une autre fin par la suite.

(ii) États-Unis

Suivant le Code, la «déclaration» et l'«information relative à la déclaration» sont confidentielles et ne peuvent être communiquées qu'en conformité avec ses dispositions. La définition de ces termes figure à l'article 6103 du Code.

> [TRADUCTION] Une «déclaration» s'entend d'une déclaration de revenus ou de renseignements, d'une estimation de l'impôt ou d'une demande de remboursement exigée, prévue ou autorisée par les dispositions du présent titre et qui est transmise au secrétaire par une personne, en son nom ou à son sujet, ainsi que de toute modification ou adjonction, y compris des annexes, des pièces jointes ou des énumérations présentées à l'appui.
>
> L'«information relative à la déclaration» s'entend de ce qui suit :
>
> (A) l'identité du contribuable, la nature, la source ou le montant de son revenu, les paiements, les rentrées, les déductions, les exemptions, les crédits, les éléments d'actif, les éléments de passif, la valeur nette, l'impôt à payer, l'impôt retenu, les insuffisances, les cotisations en trop ou les versements d'impôt, le fait que la déclaration du contribuable a fait, fait ou fera l'objet d'un examen, d'une autre enquête ou d'un nouveau traitement, toute autre donnée obtenue, consignée ou établie par le secrétaire relativement à une déclaration ou en vue de déterminer l'obligation (ou son montant) d'une personne, en application du présent titre, concernant un impôt, une pénalité, un intérêt, une amende, une perte ou une autre forme d'imposition ou encore, si une infraction a été perpétrée;
>
> (B) toute partie d'une décision écrite ou d'un dossier y afférent (suivant la définition de ces termes donnée à l'alinéa 6110*b)*) qui n'est pas accessible au public suivant l'article 6110.
>
> Est cependant exclue la donnée qui ne peut, directement ou indirectement, être associée à un contribuable en particulier ou permettre par ailleurs de l'identifier. Aucune disposition législative, y compris ce qui précède, ne doit être interprétée comme exigeant la communication des critères appliqués ou applicables pour sélectionner les déclarations qui feront l'objet d'une vérification non plus que celle des données ayant servi ou

devant servir à établir ces critères, dans la mesure où le secrétaire juge que leur communication compromettrait gravement la cotisation, la perception ou l'exécution en vertu des lois sur le revenu national.

L'«information relative à la déclaration du contribuable» s'entend de l'information relative à la déclaration définie au paragraphe (2) qui est fournie au secrétaire par le contribuable auquel l'information relative à la déclaration se rapporte ou pour son compte

(iii) Convention Canada-É.-U.

a) Introduction

Les dispositions de la Convention Canada-É.-U. relatives à l'échange de renseignements figurent à l'article XXVII. En règle générale, des renseignements peuvent être échangés en application de la Convention Canada-É.-U. à l'égard de la plupart des impôts perçus au Canada.

b) Les fins auxquelles des renseignements sont échangés

La Convention Canada-É.-U. permet aux autorités compétentes des États contractants d'échanger des renseignements à des fins précises[62]. Le Canada et les États-Unis s'échangent l'information nécessaire à l'application des dispositions tant de la Convention Canada-É.-U. que de leurs législations nationales dans la mesure où l'imposition prévue dans celles-ci n'est pas contraire à la Convention.

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[62] Au Canada, l'autorité compétente est le ministre du Revenu national ou son représentant autorisé et, aux États-Unis, le secrétaire du Trésor ou la personne qu'il délègue (alinéa 1g) de l'article III de la Convention). L'autorité compétente se compose en fait de hauts fonctionnaires des deux administrations fiscales.

c) Renseignements confidentiels

Suivant l'article XXVII de la Convention Canada-É.-U.,

> [l]es renseignements reçus par un État contractant sont tenus secrets de la même manière que les renseignements obtenus en application de la législation fiscale de cet État et ne sont communiqués qu'aux personnes ou autorités (y compris les tribunaux ou organes administratifs) concernés par l'établissement ou le recouvrement des impôts auxquels la Convention s'applique, par l'administration et la mise à exécution de ces impôts ou par les décisions sur les recours relatifs à ces impôts ou, nonobstant le paragraphe 4, ayant trait aux impôts perçus par une subdivision politique ou une collectivité locale d'un État contractant qui sont de nature analogue aux impôts visés par la Convention en vertu de l'article II (Impôts visés). Ces personnes ou autorités n'utilisent ces renseignements qu'à ces fins. Elles peuvent faire état de ces renseignements au cours d'audiences publiques de tribunaux ou dans des jugements. Les autorités compétentes peuvent communiquer à une commission d'arbitrage établie conformément au paragraphe 6 de l'article XXVI les renseignements nécessaires au déroulement de la procédure d'arbitrage; les membres de la commission d'arbitrage respectent les restrictions décrites dans le présent article en matière de communication de ces renseignements.

L'État visé par la demande a le pouvoir discrétionnaire de refuser la communication de tout renseignement qui révélerait un secret commercial, industriel, professionnel ou un procédé commercial ou des renseignements dont la communication serait contraire à l'ordre public[63].

Une interprétation trop large du secret commercial pourrait rendre presque entièrement inopérantes les dispositions relatives à l'échange de renseignements. Le paragraphe 19 des commentaires sur l'article 26 du modèle de convention fiscale de l'OCDE (1992) laisse entendre qu'« il convient de ne pas donner un sens trop large à la notion de secret ».

Les renseignements ultra secrets ne devraient pas être communiqués aisément. Lorsque la communication d'un renseignement causerait un grand préjudice à l'entreprise d'une personne, il y a lieu à prime abord de la refuser. La liste des personnes ayant touché des commissions secrètes a été assimilée à un secret commercial protégé, car sa communication aurait compromis les activités commerciales du contribuable[64].

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63 Alinéa 2c) de l'article 26 du modèle de convention fiscale de l'OCDE (1992).

64 Voir Belgique/Italie, 5 sept. 1980, tribunal désigné (Bruxelles) (*European Taxation*, mars 1987, à la p. 87) (EK, à la p. 8.2003).

Dans certaines affaires étrangères, les tribunaux ont levé le secret bancaire pour permettre la communication de renseignements à un État cocontractant[65].

Enfin, la communication de renseignements peut être refusée lorsqu'elle entraînerait la violation du secret professionnel. Le secret professionnel de l'avocat étant expressément protégé sur le plan national[66], il devrait l'être également dans le contexte de l'application d'une convention.

C. Circulation des renseignements - Demandes, réponses et communication

(i) Droit canadien

a) Demande d'une personne autorisée

Le libellé de l'article 230 de la LIR est le suivant : «(1) Quiconque exploite une entreprise et quiconque est obligé, par ou selon la présente loi, de payer ou de percevoir des impôts ou autres montants doit tenir des registres et des livres de comptes (y compris un inventaire annuel, selon les modalités réglementaires) à son lieu d'affaires ou de résidence au Canada ou à tout autre lieu que le ministre peut désigner, dans la forme et renfermant les renseignements qui permettent d'établir le montant des impôts payables en vertu de la présente loi, ou des impôts ou autres sommes qui auraient dû être déduites, retenues ou perçues». Le LIR renferme depuis peu une définition très étendue du mot « registre ». Le paragraphe 248(1) précise en effet qu'un registre s'entend des « registres, comptes, conventions, livres, graphiques et tableaux, diagrammes, formulaires, images, factures, lettres, cartes, notes, plans, déclarations, états, télégrammes, pièces justificatives et [de] toute autre chose renfermant des renseignements, qu'ils soient par écrit ou sous toute autre forme ». L'obligation du contribuable de tenir des registres, jumelée à la définition du mot « registre », permet à Revenu Canada d'avoir accès à des sources de documents et de renseignements substantielles et de grande portée.

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65 Allemagne/Suède, 20 février 1979, BFH (Bundesfinanzhof, VII, 16178) (EK, à la p. 10.5001); Suisse/É.-U., 23 décembre 1970, Bundesgericht (96-1 BGE 737) (affaire *Ryan*) (EK, à la p. 11).

66 Article 232 de la LIR.

Une personne autorisée[67] peut, pour l'application ou l'exécution de la LIR, inspecter, vérifier ou examiner les livres et registres d'un contribuable, ainsi que tout document du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la LIR. L'article 231.1 de la LIR confère par ailleurs à la personne autorisée le pouvoir de pénétrer dans un local ou dans un lieu d'affaires afin d'y examiner de tels documents et registres. Lorsque ces derniers se trouvent dans une «maison d'habitation», la personne autorisée ne peut y pénétrer sans la permission de l'occupant, à moins qu'un mandat décerné par un juge sur requête *ex parte* du ministre ne l'y autorise[68]. Suivant une version antérieure de l'article 231.3 de la LIR (qui énonçait les règles applicables à l'obtention d'un mandat de perquisition), le tribunal n'avait pas le pouvoir discrétionnaire de refuser de décerner un mandat. La disposition a été jugée invalide par la Cour suprême du Canada[69]. La version actuelle a été établie de façon à ce que le juge saisi de la requête *ex parte* du ministre soit investi d'un tel pouvoir discrétionnaire.

En pratique, Revenu Canada obtient ses mandats de perquisition en invoquant les dispositions du *Code criminel*[70].

Habituellement, lorsque la communication d'un renseignement ou d'un document s'impose dans le cadre d'une vérification, Revenu Canada formule tout d'abord sa demande de vive voix ou dans une lettre ordinaire. Dans le cas où le contribuable refuse de collaborer, une personne autorisée[71] transmet à l'intéressé une demande formelle (un avis) en application du paragraphe 231.2(1) de la LIR. L'avis doit préciser quel renseignement ou document doit être communiqué et le délai raisonnable imparti pour le faire[72]. Il peut être signifié en personne ou transmis par courrier recommandé ou certifié[73]. Signalons qu'un tribunal a statué que l'avis de produire « sans

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67 Une personne autorisée s'entend d'une personne autorisée par le ministre aux fins des articles 231.1 à 231.5 de la LIR. En général, il s'agit d'un vérificateur ou d'un enquêteur de Revenu Canada.

68 *Paragraphes 231.1 (2) et (3) de la LIR.*

69 *Baron c. La Reine*, [1993] 1 R.C.S. 416. L'emploi du mot « décerne » au lieu de « peut décerner » pour l'octroi d'un mandat a été jugé contraire à l'article 8 de la *Charte canadienne des droits et libertés* parce qu'il privait le juge du pouvoir discrétionnaire de refuser le mandat.

70 L.R.C. (1985), ch. C-46, modifié.

71 Un haut fonctionnaire désigné par règlement.

72 Un délai de 30 jours est habituellement accordé.

73 Article 231.2 de la LIR.

délai » des documents ne satisfait pas à l'exigence voulant qu'un délai raisonnable soit accordé au contribuable pour fournir le renseignement ou le document[74]. L'avis doit préciser quel renseignement ou document est demandé. L'article 231 de la LIR dispose qu'un « document » s'entend notamment d'un registre et qu'y sont assimilés les titres et les espèces. On se rappellera la définition extensive du mot « registre » figurant au paragraphe 248(1) de la LIR.

Dans *McKinlay Transport Ltd. c. La Reine*, la Cour suprême du Canada[75] a statué que la demande formelle formulée sur le fondement de l'ancien paragraphe 231.2(1) de la LIR (la procédure en cause était alors prévue au paragraphe 231(3)) constituait une saisie parce qu'elle portait atteinte aux attentes du contribuable en matière de protection de la vie privée. La Cour suprême a indiqué que « des personnes qui ne font pas l'objet d'une enquête ou d'une vérification peuvent être forcées à produire des documents relatifs à un autre contribuable qui fait l'objet d'une telle enquête ou vérification » et que la production forcée allait au-delà des exigences strictes de la LIR en matière de dépôt.

La Cour suprême a cependant estimé que la procédure ne violait pas l'article 8 de la *Charte canadienne des droits et libertés*. Selon elle, le ministre du Revenu national doit être investi de pouvoirs étendus dans la surveillance du régime de réglementation pour vérifier les déclarations de revenus et examiner tous les documents utiles à l'établissement de ces déclarations.

Outre la demande formelle prévue au paragraphe 231.2(1) de la LIR, le ministre du Revenu national peut signifier un autre genre de demande formelle visant une ou plusieurs personnes non désignées nommément suivant les paragraphes 231.2(2) et (3) de la LIR. La demande visant une « personne non désignée nommément » peut être signifiée une fois qu'un juge, sur demande *ex parte*, autorise le ministre à exiger d'un tiers des documents ou des renseignements se rapportant à une ou à plusieurs personnes non désignées nommément s'il est convaincu que cette ou ces personnes sont identifiables et qu'il s'agit de s'assurer de l'observation de la LIR par cette ou ces personnes.

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74 *Joseph et al. v. M.N.R.* 85 D.T.C. 5391 (H.C. Ont.).
75 *McKinlay Transport Ltd. c. La Reine*, [1990] 1 R.C.S. 627.

Suivant l'article 231.4 de la LIR, le ministre du Revenu national peut autoriser une personne à faire toute enquête qu'elle juge nécessaire pour l'application et l'exécution de la LIR. Le président d'enquête nommé en vertu de l'article 231.4 de la LIR est investi de tous les pouvoirs conférés à un commissaire par les articles 4 et 5 de la *Loi sur les enquêtes* et de ceux qui sont susceptibles de l'être sur le fondement de l'article 11 de cette loi. La Cour suprême a jugé constitutionnels les pouvoirs prévus à l'article 231.4 de la LIR en ce qu'ils ne limitent pas les droits garantis aux articles 7 et 8 de la *Charte canadienne des droits et libertés*[76].

Communication de renseignements confidentiels

Il est interdit à l'administration fiscale de communiquer l'information relative au contribuable à moins d'y être autorisée par la LIR. Voici le libellé de l'article 241 de la LIR :

> **241(1)** Sauf autorisation prévue au présent article, il est interdit à un fonctionnaire :
>
> *a)* de fournir sciemment à quiconque un renseignement confidentiel ou d'en permettre sciemment la prestation;
>
> *b)* de permettre sciemment à quiconque d'avoir accès à un renseignement confidentiel;
>
> *c)* d'utiliser sciemment un renseignement confidentiel en dehors du cadre de l'application ou de l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi*, ou à une autre fin que celle pour laquelle il a été fourni en application du présent article.
>
> **(2) Communication de renseignements dans le cadre d'une procédure judiciaire**. Malgré toute autre loi ou règle de droit, nul fonctionnaire ne peut être requis, dans le cadre d'une procédure judiciaire, de témoigner, ou de produire quoi que ce soit, relativement à un renseignement confidentiel.
>
> **(3) Communication de renseignements en cours de procédures.** Les paragraphes (1) et (2) ne s'appliquent :
>
> *a)* ni aux poursuites criminelles, sur déclaration de culpabilité par procédure sommaire ou sur acte d'accusation, engagées par le dépôt d'une dénonciation ou d'un acte d'accusation, en vertu d'une loi fédérale;
>
> *b)* ni aux procédures judiciaires ayant trait à l'application ou à l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi* ou de toute autre

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76 *Del Zotto c. Canada*, [1999] 1 R.C.S. 3.

loi fédérale ou provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit.

(3.1) Personnes en danger. Le ministre peut fournir aux personnes compétentes tout renseignements confidentiel concernant un danger imminent de mort ou de blessures qui menace un particulier.

La LIR interdit la communication de renseignements sur le contribuable sauf dans certaines circonstances précises énumérées aux paragraphes 241(3)[77] et 241(4), dont le texte est joint à l'annexe D. Un renseignement se rapportant à un contribuable peut toujours être fourni au contribuable en cause ou, avec son consentement, à une autre personne[78].

Des règles de procédure strictes sont suivies pour la communication de renseignements sur un contribuable. Un protocole d'entente lie Revenu Canada et certains ministères et organismes fédéraux visés au paragraphe 241(4) LIR. Il prévoit entre autres quelles personnes sont autorisées à demander à Revenu Canada de lui communiquer des renseignements sur un contribuable. Revenu Canada peut ainsi vérifier si l'auteur d'une demande est une personne autorisée, ce qui accélère le déroulement de la procédure administrative. La demande de renseignements est généralement présentée par écrit. En réponse, Revenu Canada confirme l'utilisation qui peut être faite des renseignements, à l'exclusion de toute autre. Les fonctionnaires de Revenu Canada responsables de l'application du paragraphe 241(4) de la LIR ne peuvent communiquer des renseignements sur un contribuable à un ministère ou organisme visé par cette disposition qu'après s'être assurés que l'auteur de la demande est autorisé à demander les renseignements. Lorsqu'une demande est présentée par le représentant d'un ministère ou organisme fédéral avec lequel aucun protocole d'entente n'a été conclu, on procède à des vérifications approfondies quant à l'identité de l'intéressé et à son pouvoir de présenter une telle demande.

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77 Dans *Slattery c. Doane Raymond Ltd.*, [1993] 3 R.C.S. 430, la Cour suprême du Canada a autorisé Revenu Canada à communiquer des renseignements sur un contribuable dans le cadre d'une instance de faillite pour le motif que les renseignements en cause avaient été fournis aux fins de l'administration de la LIR, c.-à-d. la perception d'un impôt dû par le mari de l'appelante.

78 Paragraphe 241(5) de la LIR. Le contribuable peut aussi obtenir un renseignement en se prévalant de la *Loi sur l'accès à l'information* suivant le sous-alinéa 241(4)*e*)(i) de la LIR.

(ii) États-Unis

b) Demandée présentée par une personne autorisée aux États-Unis

L'article 7602 du Code autorise le secrétaire à examiner livres ou registres et à contraindre la personne tenue de payer de l'impôt à comparaître devant lui munie de ces livres ou registres et à témoigner à leur sujet. Le secrétaire signifie l'assignation dans laquelle il décrit clairement les registres ou les autres documents dont il exige la production, le cas échéant. Il est investi du pouvoir de déterminer le moment et le lieu de l'examen des registres et des documents du contribuable, à la seule condition que le moment et le lieu fixés soient raisonnables dans les circonstances. La date indiquée dans l'assignation doit être postérieure d'au moins dix jours à celle l'assignation.

c) Communication de renseignements confidentiels

Le Code s'apparente à la LIR en ce que les déclarations et les renseignements fournis sont réputés confidentiels et ne peuvent donc pas être communiqués, sauf dans certains cas précis. Par exemple, leur communication est permise à une personne désignée par le contribuable, à un représentant de l'administration fiscale ou d'un organisme étatique ou local d'application de la loi, à une personne ayant un intérêt véritable (le contribuable lui-même, son conjoint, etc.), dans le cas d'une déclaration de revenus produite conjointement, à l'un ou l'autre des contribuables en cause, dans le cas de la déclaration de revenus d'une société de personnes, à une personne qui en faisait partie pendant les années visées par la déclaration, à un comité du Congrès, au président, ainsi qu'à un fonctionnaire ou à un employé fédéral aux fins de l'administration de l'impôt ou dans le cadre d'une enquête criminelle (notamment dans le but de retrouver un fugitif)[79].

Lorsque le contribuable consent à la communication à un tiers d'un renseignement d'ordre fiscal le concernant ou la demande, le secrétaire fournit le renseignement, sauf [TRADUCTION] « s'il juge que cette communication est susceptible de porter gravement atteinte à l'information d'ordre fiscal dont dispose l'administration fédérale[80].

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79 Article 6103 du Code, dont le texte est joint à l'annexe E.

80 *Alinéa 6103 c) du Code.*

Par ailleurs, le secrétaire peut refuser de communiquer un renseignement sur le contribuable à l'administration fiscale d'un État ou à un organisme étatique ou local d'application de la loi s'il est d'avis que cela permettrait d'identifier un informateur secret ou compromettrait sérieusement une enquête civile ou criminelle. Il convient de signaler que l'information relative au contribuable est toujours accessible à ces organismes, à des fins de vérification, sans qu'ils n'aient à présenter une demande en ce sens, mais seulement dans la mesure nécessaire à l'administration des lois fiscales de l'État[81].

Lorsqu'une demande valable est présentée au secrétaire, l'information relative à la déclaration peut être communiquée sous forme de document écrit ou par quelque moyen (reproduction, microfilm, photocopie, etc.) jugé nécessaire ou approprié par le secrétaire[82]. En outre, le Code prévoit que le secrétaire tient un registre des demandes de consultation ou de communication d'une déclaration et de renseignements s'y rapportant, y compris les motifs invoqués à l'appui et la date des demandes[83].

(iii) Canada

d) Renseignements étrangers

La LIR investit Revenu Canada du pouvoir de demander la communication de renseignements ou de documents étrangers. Elle prévoit une procédure de demande formelle à cet égard.

Dans le cas de renseignements ou de documents étrangers, l'article 236.1 autorise expressément la signification d'un avis exigeant leur communication. Un renseignement ou un document étranger s'entend d'un renseignement ou d'un document accessible ou situé à l'étranger et qui peut être utile à l'application ou à l'exécution de la LIR. L'avis visé à

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81 Le personnel du ministère du Trésor a également accès à la déclaration et à l'information relative à la déclaration sans avoir à présenter une demande écrite en ce sens.

82 Article 6103 du Code.

83 Le registre peut être consulté par le comité conjoint sur la fiscalité ou par la personne qui le dirige. Au plus tard 90 jours après la fin de chaque année civile, le secrétaire remet le registre au comité conjoint sur la fiscalité. Signalons que pour chacun des organismes fédéraux le registre fait état du nombre de demandes de communication, des cas dans lesquels la déclaration du contribuable et l'information y afférente ont effectivement été communiquées, ainsi que des fins auxquelles les demandes ont été formulées.

l'article 236.1 peut être donné à tout stade de la procédure d'établissement de la cotisation[84] et il peut être signifié à une personne résidant au Canada ou à une personne n'y résidant pas[85]. L'omission de la personne de communiquer le renseignement ou le document demandé peut l'empêcher de produire tout renseignement ou document étranger visé par l'avis dans le cadre d'une instance civile se rapportant à l'application et à l'exécution de la LIR[86].

Toutefois, l'utilité de la signification d'un avis à une personne ne résidant pas au Canada est sensiblement diminuée par l'inaptitude juridique de Revenu Canada d'exercer ses pouvoirs d'enquête à l'extérieur du territoire canadien.

Vu la relative facilité avec laquelle un renseignement peut être obtenu d'une personne résidant au Canada par voie de mise en demeure, l'administration fiscale peut être tentée de s'adresser à une telle personne pour obtenir un renseignement qu'il serait plus difficile d'obtenir directement d'une personne ne résidant pas au Canada. Tel a été le cas dans l'affaire *Spencer c. La Reine*[87]. Dans le cadre du procès au Canada d'une personne accusée d'évasion fiscale ayant fait affaire avec la succursale de la Banque Royale du Canada aux Bahamas, une assignation avait été signifiée à un ancien directeur de celle-ci qui résidait désormais au Canada. Dans un arrêt unanime, la Cour suprême du Canada a statué que l'ancien directeur de la succursale ne pouvait refuser de témoigner pour le motif que la communication des renseignements demandés l'exposerait à des accusations criminelles aux Bahamas. Elle a indiqué que toute atteinte éventuelle à la liberté et à la sécurité du témoin résulterait de l'application de la loi bahamienne, et non de la loi canadienne et, partant, elle a rejeté tous les arguments fondés sur la *Charte canadienne des droits et libertés*[88]. Le juge LaForest a expressément approuvé les motifs de la Cour d'appel de l'Ontario, qui a établi une distinction avec l'une de ses décisions antérieures, *Frischke et al. v. Royal Bank of Canada*[89], où elle avait refusé de contraindre la Banque à obliger les employés de sa succursale panaméenne à communiquer des documents et à contrevenir ainsi à la loi panaméenne. La distinction a été établie parce que l'information demandée dans cette

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84 *Merko c. M.R.N.*, 90 DTC 6643 (C.F. 1re inst.).

85 Paragraphe 231.6(2) de la LIR.

86 Paragraphe 231.6(8) de la LIR.

87 [1998] 2 R.C.S. 278; 85 DTC 5446; [1985] 2 CTC 311.

88 *Charte canadienne des droits et libertés*, Loi constitutionnelle de 1982, annexe B de la Loi de 1982 sur le Canada, ch. 11 (R.-U.).

89 1977, 17 O.R. (2d) 388; 80 D.L.R. (3d) 393.

affaire se trouvait au Panama et devait être fournie par des personnes résidant au Panama, alors que, dans *Spencer*, l'information demandée se trouvait dans les souvenirs d'un résident et citoyen canadien appelé à témoigner au Canada. Il semble donc exister en droit canadien une distinction fondée sur l'emplacement des renseignements et, dans une moindre mesure, sur l'emplacement du témoin.

Il est juste de dire, par conséquent, que les pouvoirs d'enquête conférés à Revenu Canada par la LIR sont limités par la règle juridictionnelle fondamentale qui interdit à un État d'exercer les pouvoirs liés à sa souveraineté à l'extérieur de son territoire. Lorsqu'une société canadienne ou une succursale canadienne d'une société étrangère se voit signifier un avis en application de l'article 231.6 de la LIR et que le destinataire ne peut y donner suite sans contrevenir aux lois de l'État étranger où se trouvent les renseignements, il appert que la mise en demeure devrait être annulée pour le motif qu'elle est déraisonnable, sur le fondement de l'alinéa 231.6(5)*c)* de la LIR.

Par ailleurs, signalons que l'envoi d'un avis à une société canadienne pour obtenir des renseignements de sociétés étrangères liées est exclu dans tous les cas impossible en vertu de la loi canadienne. Dans le contexte de l'application des règles de la Cour fédérale relatives à la production de documents détenus par un tiers, la Cour fédérale a conclu, dans *Bowlen c. La Reine* (n° 2)[90], que l'avis signifié à une société ne vise pas les documents détenus par ses filiales. Dans *Indalex Limited c. La Reine*[91], le juge Walsh s'est livré à un examen approfondi de la jurisprudence pertinente et a conclu qu'un dirigeant d'une société canadienne ne pouvait être contraint de se renseigner sur une société liée étrangère à l'instance.

Lorsque Revenu Canada signifie l'avis en application de l'article 231.2 de la LIR pour se soustraire au contrôle judiciaire prévu au paragraphe 231.6(5), le destinataire devrait pouvoir soutenir que, ne pouvant donner suite à l'avis sans contrevenir à des dispositions étrangères, il devrait être dispensé de se conformer à l'avis sur le fondement du paragraphe 231.5(2) LIR[92]. Reste à déterminer s'il y a lieu de se conformer à l'avis fondé sur l'art. 231.2 ou 231.6 de la LIR lorsque l'obligation de donner suite à l'avis au Canada constitue, en droit étranger, un moyen de défense à l'infraction pouvant alors être commise. Quoi qu'il en soit, il faut s'assurer tout d'abord

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90 [1978] 1 C.F. 798; 77 DTC 5433; [1977] CTC 531; 5 C.P.C. 215 (C.F. 1re inst.).

91 84 DTC 6018 (C.F. 1re inst.), confirmé dans : 84 DTC 6492 (C.A.F.).

92 Voir D.W. Smith, « Powers of Investigation » 82 CMC 122, à la p. 152.

de l'existence du moyen de défense suivant le droit étranger. Lorsque celle-ci est incertaine, il peut en résulter des conséquences funestes, de sorte que l'avis devrait être sans effet.

Les renseignements visés par le secret professionnel de l'avocat sont expressément protégés contre les avis signifiés au Canada en application de l'article 231.2 de la LIR, mais une telle protection n'est pas expressément prévue à l'égard des avis signifiés sur le fondement de l'article 231.6 de la LIR pour l'obtention de renseignements étrangers. Cependant, rien n'empêche un avocat étranger d'obtenir l'annulation d'un avis fondé sur l'article 231.6 et visant des renseignements protégés par le secret professionnel, pour le motif qu'il est déraisonnable, suivant l'alinéa 231.6(5)*c*). Il ne s'agit que d'un exemple où l'obéissance constituerait la violation d'une loi étrangère et où le destinataire se retrouvait dans une situation intenable et perdrait sur tous les tableaux. Il est donc improbable que la décision *Vetco* soit suivie au Canada.

(iv) États-Unis

L'article 982 du Code énonce les règles applicables à l'obtention de documents étrangers. Il y a lieu de recourir initialement à ces règles pour obtenir un document étranger.

Dans l'affaire *U.S. v. Vetco Inc.*[93], l'Internal Revenue Service avait assigné Vetco Inc., ainsi que ses comptables et ses avocats, afin de les contraindre à communiquer des renseignements sur la filiale suisse de Vetco. Le tribunal a statué que la responsabilité pénale éventuelle des comptables et des avocats en droit suisse ne faisait pas obstacle aux assignations ni aux peines susceptibles d'être infligées en cas de désobéissance. Pour arriver à cette conclusion, le tribunal a jugé que l'intérêt des États-Unis primait l'intérêt suisse. Il a établi une distinction avec la décision *Société internationale pour participations industrielles v. Rogers*[94], où le tribunal avait refusé de rejeter la plainte de la demanderesse concernant l'omission d'obtempérer, la demanderesse ayant fait des efforts louables pour obéir. La distinction a été faite pour deux raisons : 1) le tribunal a conclu que, contrairement à cette affaire, les personnes visées par les assignations n'avaient pas fait d'efforts véritables pour obtempérer et 2) la demande en cause dans *Société internationale* revêtait un caractère civil et la communication avait une fonction nationale moins pressante qu'une assignation de l'IRS afférente à une enquête portant sur

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93 1981 1 USTC 9428 (CA 9th cir.) (11 mai 1981) (EK, à la p. 22).

94 357 U.S. 197, 78 S. Ct. 1098, 2 L. Ed. 2d 1255.

d'éventuels actes criminels. Des conclusions semblables ont été tirées dans *U.S. v. Quigg*[95], *Public Admin. v. Royal Bank of Canada*[96] et *In Re Grand Jury Proceedings the Bank of Nova Scotia United States v. Bank of Nova Scotia*[97]. Dans ces trois affaires, les succursales américaines de banques canadiennes ont été contraintes d'obtenir et de communiquer des renseignements sur les comptes de clients détenus par des succursales ou des filiales non américaines des banques. Ces décisions ont été critiquées[98] et ne seraient pas aisément applicables au Canada vu l'attitude moins arrogante du Canada en matière d'application extraterritoriale de ses lois, comme l'atteste son principe fondé sur l'emplacement[99]. Il n'est pas étonnant que le Canada ait dépêché un *amicus curiae* auprès du gouvernement américain, relativement à l'affaire *Bank of Nova Scotia*, pour contester les mesures prises par les É.-U. étant donné que les renseignements se trouvaient aux îles Caïmans[100].

En résumé, tout renseignement sur le contribuable est réputé confidentiel. L'administration fiscale a droit à cette information lorsqu'elle examine les déclarations de revenus dans lesquelles elle figure. Par ailleurs, lorsqu'elle procède à une vérification relativement à une personne physique ou morale, elle a le droit d'exiger et d'obtenir tout renseignement ou document nécessaire pour mener l'examen à bien. Lorsque l'information voulue se trouve au Canada ou aux États-Unis, les règles prévues dans le Code ou dans la LIR, selon le cas, régissent son obtention. Cependant, vu l'applicabilité restreinte des pouvoirs d'enquête nationaux dans un contexte international, l'application des dispositions de la Convention Canada-É.-U. relatives à l'échange de renseignements est essentielle.

v) Convention Canada-É.-U.

e) Demande d'une personne autorisée

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95 81-2 USTC 9732.

96 19 N.Y. 2d 127; 278 N.Y. S2d 378 (NYCA, 1976).

97 740 F. 2d 817 (11th Cir. 1984).

98 J. Fried, « L'application extraterritoriale des lois et les politiques canadienne et américaine en matière d'extraterritorialité » (1986), 3 *Revue québécoise de droit international* 337; J.-G. Castel, « Compelling Disclosure by a Non-Party Litigant in Violation of Foreign Bank Secrecy Laws: Recent Developments in Canada-United States Relations » (1985) 23, *Annuaire canadien du droit international* 261.

99 J. Fried, *ibid.*

100 Mémoire du gouvernement du Canada en tant qu'*amicus curiae* à l'appui de la demande de bref de certiorari, 23 octobre 1984.

Avant de présenter une demande de renseignements, l'État requérant s'assure que toutes les conditions préalables ont été remplies. Ces conditions préalables sont énoncées dans le guide de Revenu Canada relatif à l'échange de renseignements[101] (le « guide canadien »).

Dans le cas de l'échange de renseignements en particulier, les renseignements doivent être circonscrits et se rapporter à un ou plusieurs contribuables donnés[102]. À cet égard, le guide dit clairement que la disposition prévoyant l'échange de renseignements ne doit pas être invoquée pour effectuer une recherche à l'aveuglette[103]. Lorsque la demande comporte la signification d'un avis à une personne non désignée nommément pas l'autre État, une autorisation judiciaire doit être obtenue au préalable puisque celle-ci est obligatoire dans le contexte national pour toute demande visant une personne non désignée nommément en application du paragraphe 231.2(3) de la LIR.

De plus, Revenu Canada ne semble recourir à la demande de renseignements que lorsqu'une somme ou un principe important est en cause[104].

Mais surtout, une demande ne peut être formulée que si des mesures raisonnables ont été prises pour obtenir les renseignements de sources canadiennes et que toutes les sources ont été épuisées[105]. Cette dernière exigence est compatible avec l'alinéa 9*a*) des commentaires sur le modèle de convention fiscale de l'OCDE 1992, qui précise qu'« il faut utiliser tout d'abord les sources habituelles de renseignements prévues par la procédure fiscale interne avant de présenter la demande de renseignements à l'autre État ».

Si on peut raisonnablement s'attendre à ce que l'État requis doive procéder à une perquisition ou à une saisie pour obtenir les renseignements, une demande ne sera présentée à l'égard de ceux-ci qu'après l'obtention d'une autorisation judiciaire au Canada. C'est ce qui ressort de la récente décision de la Cour d'appel fédérale dans *Schreiber c. Canada (Procureur général)*[106]. La Cour d'appel a dit clairement qu'« un gouvernement ne peut se réclamer de

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101 T4121, modifié, joint à l'annexe F des présentes.
102 Article 3.3 du guide.
103 Article 3.3.1 du guide.
104 *Ibid.*
105 *Ibid.*
106 [1997] J.C.F. 277.

l'assistance internationale pour se justifier d'adopter une conduite inadmissible au regard de sa propre Constitution ».

La procédure de demande est interne car le contribuable au sujet duquel les renseignements doivent être communiqués n'a pas à être informé. Compte tenu des instructions données dans le guide canadien, le vérificateur qui souhaite obtenir des renseignements doit présenter une demande en ce sens au comité TACRE du bureau de district ou à la Division de la vérification internationale de la Direction de l'impôt international.

Lorsqu'une demande de renseignements est transmise par une partie à une convention liant le Canada, la Direction de l'impôt international détermine tout d'abord si la demande est conforme ou non à la Convention Canada-É.-U.[107]. À cette fin, on s'attendrait à ce que la Direction de l'impôt international recueille suffisamment d'éléments de preuve selon lesquels, notamment, l'information recherchée pourrait être obtenue en application de la législation nationale de l'État requérant. Dans une affaire américaine, une demande visant l'exécution d'une assignation signifiée par l'IRS en réponse à une demande de renseignements formulée par la Norvège a été rejetée pour le motif que l'IRS n'avait pas établi, à la satisfaction du tribunal, que cette mesure ne serait pas incompatible avec la législation norvégienne[108].

Une fois qu'il est établi que la demande de renseignements respecte la Convention Canada-É.-U. débute la tâche délicate qui consiste à y donner suite. Si tous les renseignements demandés ne sont pas déjà réunis, la Convention Canada-É.-U. exige que des efforts soient consentis pour obtenir les éléments manquants, et les pouvoirs nationaux d'enquête doivent être exercés.

Si un avis est donné, son objet doit être révélé au destinataire. Il s'agit du principe de l'information suffisante, et l'omission de s'y conformer peut invalider l'avis[109]. Il n'est toutefois pas nécessaire de communiquer l'objet de l'avis par écrit au destinataire. Il suffit de lui dire de vive voix pourquoi l'avis a été transmis[110].

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107 Article 3.3.2 du guide.

108 *Lincoln First Bank et al. v. U.S.*, (1980) (So. Dist. NY) (M-18-304, 2/14/80) (EK, à la p. 19).

109 *Montreal Aluminium Processing Limited et al. c. M.R.N.* 92 DTC 6567 (C.A.F.), infirmant 91 DTC 5424 (C.F. 1re inst.).

110 *Thomas G. Andison c. M.R.N.*, 95 DTC 5058 (C.F. 1re inst.).

f) Communication

L'échange de renseignements en application de l'article XXVII de la Convention Canada-É.-U. est assujetti au principe de la réciprocité. La réciprocité est prévue dans les dispositions pertinentes de toutes nos conventions fiscales, y compris les plus anciennes. Elle assure essentiellement l'application de règles du jeu équitables aux deux États contractants et réduit le risque de situations embarrassantes. Le principe de la réciprocité fonde les alinéas 26(2)*a*) et *b*) du modèle de convention fiscale de l'OCDE (1992). L'alinéa 26(2)*a*) prévoit en somme qu'un État contractant n'est pas tenu de prendre des mesures administratives dérogeant à sa législation et à sa pratique administrative ou à celles de l'autre État contractant. L'alinéa 26(2)*b*) dispose qu'un État contractant n'est pas tenu de fournir des renseignements qui ne peuvent être obtenus sur la base de sa législation ou dans le cadre de sa pratique administrative normale ou de celles de l'autre État contractant.

Signalons que, à défaut de réciprocité, l'État requis a la faculté, et non l'obligation, de refuser d'accéder à la demande de communication de renseignements en application de la convention. Le paragraphe 17 des commentaires sur l'article 26 du modèle de convention fiscale de l'OCDE (1992) précise ce qui suit :

> Dans les cas visés aux paragraphes ci-dessus, l'État requis est libre de refuser de fournir les renseignements. Toutefois, s'il communique les renseignements demandés, il reste dans le cadre de l'accord sur l'échange de renseignements prévu par la Convention; on ne pourra donc faire valoir que cet État a manqué à l'obligation du secret.

La deuxième phrase du paragraphe 17 ne fait pas mention de la possibilité que l'État requis soit empêché par sa législation nationale de communiquer les renseignements lorsque la convention ne l'y oblige pas. Par exemple, la législation nationale peut ne permettre la communication de ces renseignements que si la convention l'exige. Or, ce n'est pas le cas au Canada. Le sous-alinéa 241(4)*e*) (xii) de la LIR autorise Revenu Canada à fournir des renseignements sur le contribuable « ... uniquement pour [l']application... [d']une disposition de quelque convention ou accord fiscal... » et, par conséquent, permet la communication de renseignements que le Canada peut refuser de fournir. Il n'existe actuellement aucune jurisprudence canadienne quant à savoir si l'État requis peut engager sa responsabilité civile en dévoilant des renseignements préjudiciables qu'il aurait pu s'abstenir de communiquer.

Comme la législation nationale d'un État peut être plus restrictive que celle d'un autre quant à l'étendue de l'information qui peut être communiquée en réponse à une demande de renseignements formulée en application de la Convention Canada-É.-U., un État peut obtenir des renseignements qu'il ne serait pas en mesure de fournir à la demande de l'autre État. Les obligations prévues dans nos conventions fiscales en matière d'échange de renseignements sont réciproques, mais les législations nationales respectives peuvent différer et donner lieu à des échanges asymétriques.

Étant donné que la législation nationale est déterminante quant à l'étendue des renseignements susceptibles d'être échangés en application d'une convention, il est particulièrement important de se pencher sur la façon dont elle s'applique dans ce contexte.

En général, Revenu Canada ne peut exercer ses pouvoirs d'enquête qu'à des fins liées à l'application et à l'exécution de la LIR[111]. Toutefois, le paragraphe 16 des commentaires sur l'article 26 du modèle de convention fiscale de l'OCDE (1992) dit que « ... l'État requis doit rassembler les renseignements nécessaires à l'autre État dans les mêmes conditions que s'il s'agissait d'appliquer ses propres règles d'imposition ... ». Dans *Montreal Aluminium Processing Limited c. M.R.N.*[112], la Cour fédérale a examiné ce libellé et a conclu que les avis fondés sur l'article 231.2 de la LIR pouvaient être signifiés relativement aux renseignements demandés par l'administration fiscale américaine.

Aux États-Unis, l'IRS peut obtenir plus de renseignements en application de la convention que sur le fondement de la législation nationale. Les tribunaux américains ont statué que le destinataire d'une assignation de l'IRS liée à une demande de renseignements présentée en application d'une convention ne bénéficiait pas des garanties constitutionnelles reconnues en droit américain et qui empêchent l'assignation une fois que l'enquête criminelle a été déférée à un grand jury[113].

Il existe trois types de communication de renseignements suivant les conventions fiscales auxquelles le Canada et les États-Unis sont parties.

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111 Voir p. ex. le paragraphe 231.1(1) de la LIR.

112 91 DTC 5424 (C.F. 1re inst.), infirmé pour d'autres motifs dans : 92 DTC 6567 (C.A.F.).

113 Voir *U.S. v. Manufacturers and Traders Trust Company*, 83-1 USTC 9263 (CA 2nd Cir.); *U.S. v. Stuart et al.*, 89-1 USTC 9185 (US Sup. Ct) (28 février 1989).

Le premier est qualifié d'échange « automatique » ou « de routine ». Il s'agit habituellement de feuillets de renseignements établis au Canada ou aux É.-U. par un particulier ou une société n'y résidant pas, transmis d'un État à l'autre, de manière automatique, sans demande préalable, ayant par exemple pour objet des dividendes ou des intérêts. L'administration fiscale canadienne ou américaine, selon le cas, transmet automatiquement l'information à l'administration fiscale de l'État dans lequel réside le contribuable.

Le deuxième type d'échange correspond à la demande expresse présentée par l'administration fiscale d'un État à celle d'un autre État lorsqu'il n'existe aucun autre moyen d'obtenir le renseignement par les voies nationales. Les parties à la convention sont tenues de donner suite à une telle demande comme si elles procédaient à une enquête fiscale pour leur propre compte.

Le troisième type d'échange est dit « spontané ». L'information est communiquée lorsque, en soumettant une personne physique ou morale à une vérification, un État découvre un renseignement susceptible d'en intéresser un autre ou de lui être utile. L'État transmet le renseignement à l'autre spontanément.

Il importe de signaler que, aux États-Unis, même si l'article 6103 du Code permet l'échange de renseignements avec d'autres organismes américains d'application de la loi, tel n'est pas le cas lorsque l'information est échangée en application de la Convention Canada-É.-U., car celle-ci n'autorise l'échange qu'en matière fiscale.

vi) Pratique administrative actuelle

g) Canada

Lorsqu'il détermine qu'un renseignement doit être obtenu d'une autorité étrangère et qu'une demande expresse doit être formulée en ce sens, le vérificateur ou l'enquêteur transmet une demande au bureau de services fiscaux, à la Division de la vérification internationale, à la Direction des enquêtes spéciales ou au comité de l'imposition des transactions liées à une entreprise étrangère, qui l'achemine à la Direction de l'impôt international. Il importe de signaler que, avant de présenter une demande, le vérificateur ou l'enquêteur doit avoir consenti tous les efforts raisonnables pour obtenir le renseignement d'une source canadienne, y compris le recours

à l'article 231.6 de la LIR relativement à un renseignement ou document étranger. Après examen, la Direction de l'impôt international transmet la demande du vérificateur ou de l'enquêteur à l'autorité compétente de l'autre État. Le renseignement qui est échangé spontanément, soit celui qui est porté à la connaissance d'un vérificateur ou d'un enquêteur pendant le déroulement d'une vérification ou d'une enquête, est également transmis par le vérificateur ou l'enquêteur à la Direction de l'impôt international par l'entremise de la Division de la vérification internationale, de la Direction des enquêtes spéciales ou du comité de l'imposition des transactions liées à une entreprise étrangère. Après examen, la Direction de l'impôt international achemine le renseignement à l'autorité compétente de l'autre État. Aucune autorisation judiciaire ne doit être obtenue au préalable.

Lorsqu'un État cocontractant transmet un renseignement spontanément à la Direction de l'impôt international, cette dernière en saisit le bureau de services fiscaux compétent, qui décide de l'usage qu'il convient d'en faire.

La demande expresse présentée par un État cocontractant, en l'occurrence les États-Unis, transite également par la Direction de l'impôt international, qui s'assure de sa conformité à la Convention Canada-É.-U. Une fois qu'elle a déterminé que les critères prévus dans la convention sont respectés, la Direction de l'impôt international achemine la demande au bureau de services fiscaux compétent en vue de la prise d'une mesure. Dès que le vérificateur ou l'enquêteur a obtenu le renseignement, soit en consultant le dossier, soit en procédant à une enquête, il rédige une note de service renfermant le renseignement et il la transmet à la Direction de l'impôt international, qui apporte la touche finale à la réponse, y appose sa signature et la transmet à l'autorité requérante. Aucune autorisation judiciaire n'est nécessaire pour la communication d'un renseignement demandé expressément.

h) États-Unis

Aux États-Unis, l'autorité compétente est le commissaire adjoint (impôt international), et toute demande ou communication d'un renseignement doit être approuvée par lui.

Comme signalé précédemment, l'échange spontané vise un renseignement découvert pendant une vérification et qui, selon le fonctionnaire de l'impôt, sera utile à un État cocontractant. Le

fonctionnaire qui découvre le renseignement le transmet au commissaire adjoint (impôt international), qui l'examine puis l'achemine à l'autorité compétente étrangère. Aucune autorisation judiciaire n'est requise pour la communication d'un tel renseignement. L'autorité compétente aux États-Unis qui reçoit un renseignement fourni spontanément par une autorité étrangère l'examine puis, si elle le juge opportun, le transmet aux autorités fiscales locales.

Le fonctionnaire de l'impôt qui, dans le cadre d'un examen ou d'une enquête, souhaite obtenir un renseignement d'une autorité étrangère transmet une demande écrite détaillée au commissaire adjoint (impôt international). La demande est aussi détaillée que possible de façon que l'autorité compétente étrangère puisse saisir d'emblée l'objet de la demande. Après examen, le commissaire adjoint (impôt international) transmet la demande directement à l'autorité compétente de l'État étranger. Aucune autorisation judiciaire ne doit être obtenue au préalable.

Suivant l'*Exchange of Information Field Guide*[114] (le « **guide américain** »), la demande de renseignements adressée aux É.-U. est transmise par l'autorité étrangère au commissaire adjoint (impôt international), qui, après examen, détermine si elle est acceptable[115]. La demande jugée acceptable est transmise au bureau de district compétent. La demande qui exige une assignation est acheminée au directeur du bureau des programmes internationaux, qui obtient l'information. L'information demandée peut appartenir à deux catégories : i) celle qui figure déjà dans le dossier de l'administration fiscale ou ii) celle dont l'obtention nécessite la rencontre du contribuable, la tenue d'une enquête fiscale ou la mise en rapport avec un tiers. La seule conséquence importante de l'appartenance à une catégorie plutôt qu'à une autre est le temps qu'il faut pour obtenir l'information demandée. Le délai d'obtention du renseignement appartenant à la deuxième catégorie sera vraisemblablement plus long. En outre, pour obtenir ce renseignement, l'administration fiscale doit appliquer la législation nationale.

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114 Le Bureau du commissaire adjoint (impôt international), Bureau des programmes internationaux, Division des conventions fiscales, *Exchange of information Field Guide*, dont le texte est joint à l'annexe G des présentes.

115 Suivant le guide américain, pour déterminer si la demande est acceptable, l'autorité compétente tient notamment compte du fait que les conditions énoncées dans les dispositions relatives à l'échange de renseignements sont remplies ou non, que l'information demandée, de par sa nature, peut être communiquée ou non et que le caractère confidentiel de l'information fournie sera vraisemblablement protégé ou non.

Une fois le renseignement obtenu, il est envoyé à l'autorité compétente qui l'examine afin de décider s'il sera envoyé à l'état requéreur. L'autorité compétente fournit une déclaration quant à l'utilisation restreinte qui peut être faite du renseignement. Il appartient à l'autorité compétente de déterminer si le renseignement devrait être communiqué ou non. Par exemple, elle peut déterminer que la communication du renseignement est contraire à l'ordre public. Aucune autorisation judiciaire ne doit être obtenue avant de transmettre le renseignement.

Demande de l'administration fiscale canadienne (par l'entremise de la Direction de l'impôt international) à l'administration fiscale américaine (commissaire adjoint - impôt international)

En tant qu'autorité canadienne compétente, la Direction de l'impôt international peut, sans obtenir une autorisation judiciaire préalable, demander à l'autorité compétente américaine, le commissaire adjoint (impôt international), de lui communiquer des renseignements. Voici quels sont les scénarios possibles :

- présenter une demande de renseignements ou échanger des renseignements lorsque le gouvernement américain dispose des renseignements et que ces derniers ont été fournis sur une base volontaire ou ont été obtenus dans le cadre normal des activités;

- présenter une demande (à condition qu'il y ait réciprocité) de renseignements ou échanger des renseignements lorsque le gouvernement américain dispose des renseignements et les a obtenus dans le cadre d'une enquête;

- présenter une demande de renseignements (à moins qu'une autorisation judiciaire aurait dû être obtenue en application de l'article 231.1 (mandat de perquisition), du paragraphe 231.2(2) (personnes non désignées nommément) ou du paragraphe 231.1(2) (maison d'habitation)) ou échanger des renseignements, lorsque le Canada demande aux É.-U. d'obtenir les renseignements.

Communication volontaire de renseignements par l'administration fiscale canadienne à l'administration fiscale américaine, à l'exclusion de toute demande expresse

Le Canada peut communiquer volontairement des renseignements fiscaux aux États-Unis sans avoir reçu une demande en ce sens et sans obtenir une autorisation judiciaire au préalable. Voici dans quels cas de tels renseignements peuvent être communiqués :

- communiquer des renseignements que le gouvernement canadien a obtenus sur une base volontaire ou dans le cadre normal de ses activités;
- communiquer des renseignements (à l'exclusion de documents ou de renseignements faisant l'objet d'une ordonnance judiciaire de saisie) que le gouvernement canadien a obtenus dans le cadre d'une enquête.

Demande de renseignements fiscaux présentée par les É.-U. au Canada

Le Canada peut communiquer des renseignements fiscaux en réponse à une demande formulée par l'administration américaine sans obtenir au préalable une autorisation judiciaire. Voici quels sont les scénarios possibles :

- présenter une demande de renseignements ou échanger des renseignements lorsque le gouvernement canadien dispose des renseignements et que ces derniers ont été fournis sur une base volontaire ou obtenus dans le cadre normal des activités;
- présenter une demande de renseignements ou échanger des renseignements (sauf s'ils font l'objet d'une ordonnance judiciaire de saisie), lorsque le gouvernement canadien dispose des renseignements et les a obtenus dans le cadre d'une enquête;
- présenter une demande de renseignements ou échanger des renseignements (sauf si une autorisation judiciaire aurait dû être obtenue en application de l'article 231.1 (mandat de perquisition), du paragraphe 231.2(2) (personnes non désignées nommément) ou du paragraphe 231.1(2) (maison d'habitation)), lorsque le Canada demande aux É.-U. d'obtenir les renseignements.

Réponse des É.-U. à la demande de renseignements fiscaux présentée par le Canada

L'administration fiscale américaine peut répondre aux demandes de renseignements présentées par le Canada sans obtenir au préalable une autorisation judiciaire. Voici quels sont les scénarios possibles :

- fournir les renseignements que le gouvernement américain a obtenus sur une base volontaire ou dans le cadre normal de ses activités;
- fournir les renseignements que le gouvernement américain a obtenus dans le cadre d'une enquête.

(vii) Traité d'entraide juridique

Tant les É.-U. que le Canada peuvent, grâce au traité d'entraide juridique, obtenir des éléments de preuve étrangers et toute autre assistance aux fins d'une affaire fiscale relevant du droit pénal. Aux É.-U., lorsqu'une enquête fiscale est susceptible de comporter un élément pénal, le commissaire adjoint (impôt international) en est informé, après quoi il détermine sur quelle base les renseignements seront demandés[116].

D. Sanctions en cas de communication illégitime de renseignements confidentiels

(i) Canada

La personne qui contrevient à l'article 241 de la LIR, lequel interdit la communication ou l'utilisation d'un renseignement sur le contribuable ou de donner accès à un tel renseignement, commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de 12 mois, ou l'une de ces peines[117]. Il convient de rappeler par ailleurs que la LIR prévoit dans quelles circonstances et à quelles fins l'information relative au contribuable peut être communiquée. La personne à laquelle le renseignement est fourni qui, sciemment, l'utilise, le communique ou en permet la prestation ou l'accès commet également une infraction et encourt, sur déclaration de culpabilité par procédure

116 Page 2 du guide américain.
117 Paragraphe 239(2.2) de la LIR.

sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de 12 mois, ou l'une de ces peines[118].

(ii) États-Unis

Le fonctionnaire ou l'employé des États-Unis, y compris un ancien fonctionnaire ou un ancien employé des États-Unis, qui communique sciemment une déclaration ou de l'information relative à une déclaration autrement qu'en conformité avec le Code commet un délit et encourt, sur déclaration de culpabilité, une amende maximale de 5 000 $ et un emprisonnement d'au plus 5 ans, ou de l'une de ces peines. En outre, le fonctionnaire ou l'employé des États-Unis qui est reconnu coupable de l'infraction est congédié ou destitué[119]. La personne qui, sciemment, communique une déclaration ou de l'information relative à une déclaration obtenue par elle ou par une autre personne est également passible d'une amende maximale de 5 000 $ et d'un emprisonnement d'au plus 5 ans, ou l'une de ces peines[120]. Le Code inflige la même sanction à la personne à qui une déclaration ou de l'information relative à une déclaration est communiquée contrairement à ses dispositions et qui fait imprimer ou publie ces renseignements. Enfin, la même peine est prévue à l'égard de la personne qui, sciemment, offre un article de valeur en échange d'une déclaration ou de toute information relative à une déclaration et qui reçoit une telle déclaration ou information.

De plus, le contribuable peut intenter une action en responsabilité civile contre l'État américain lorsqu'un fonctionnaire ou un employé de l'IRS communique sciemment de l'information relative à sa déclaration[121]. Il peut également poursuivre au civil la personne qui, sans être un employé de l'IRS, communique de l'information relative à sa déclaration[122].

(iii) Convention Canada-É.-U.

La communication non autorisée de renseignements sur le contribuable constitue une infraction suivant le paragraphe 239(2.2) de la LIR. Le contrevenant est passible d'une peine, que la

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118 Paragraphe 239(2.21) de la LIR.
119 Article 7213 du Code.
120 *Ibid.*
121 Article 7431 du Code.
122 Article 7431 du Code.

communication illégitime ait lieu sur le plan national seulement ou dans le contexte de l'application d'une convention.

Aux États-Unis, les tribunaux ont statué que les renseignements obtenus indûment par une partie à une convention fiscale en réponse à une demande de renseignements des États-Unis constituent des éléments de preuve inadmissibles dans la mesure où leur mode d'obtention par l'État cocontractant aurait également été illégal aux États-Unis[123].

Dans une affaire belge, le tribunal a tenu l'administration fiscale belge responsable du préjudice causé par la communication illégitime de renseignements sur le contribuable à l'administration fiscale italienne[124]. Dans cette affaire, une entreprise belge avait versé des commissions occultes aux acheteurs de différentes entreprises italiennes. L'administration italienne voulait connaître l'identité des acheteurs afin d'assujettir les sommes à l'impôt italien. Le tribunal a conclu qu'il s'agissait d'un secret commercial que l'administration belge avait le devoir de ne pas communiquer sachant qu'il en résulterait un préjudice pour l'un de ses contribuables.

La décision rendue dans cette affaire est incompatible avec l'énoncé du paragraphe 17 des commentaires sur l'article 26 du modèle de convention fiscale de l'OCDE (1992) selon lequel on ne peut faire valoir que l'État a manqué à l'obligation du secret en communiquant des renseignements qu'il avait la faculté de ne pas fournir en application d'une convention fiscale.

Au Canada, la Couronne engage sa responsabilité civile lorsque la communication illégitime de renseignements constitue un délit pour lequel elle ne jouit d'aucune immunité.

En règle générale, la Couronne n'engage pas sa responsabilité lorsqu'elle prend des décisions de politique générale, tandis qu'elle engage sa responsabilité du fait de ses décisions de nature opérationnelle lorsque certaines conditions sont remplies.

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123 *U.S. v. Wolf*, F. Supp. 435 (N.D. III 1984); *U.S. v. Popovitch*, 79-2 USTC 9732 (26 octobre 1979) (Dist. Ct. Fl., le juge Hodges.).

124 Belgique/Italie, 5 septembre 1980, tribunal désigné (Bruxelles) (*European Taxation*, mars 1987, à la p. 87) (EK, à la p. 8.2003).

La distinction entre décisions de politique générale et décisions de nature opérationnelle a disparu en Angleterre[125], alors qu'elle s'applique toujours au Canada[126]. L'abandon de la distinction en Angleterre est vraisemblablement attribuable aux difficultés de son application et à l'impossibilité de tracer une ligne de démarcation nette entre les décisions qui sont strictement de politique générale et celles qui sont strictement opérationnelles.

Dans l'arrêt *Brown*[127], le juge Cory explique la distinction de la manière suivante :

> Pour distinguer les questions de politique générale des opérations, il peut être utile de passer en revue quelques-uns des facteurs pertinents à cet égard. Ces facteurs se dégagent des arrêts de notre Cour *Laurentide Motels Ltd. c. Beauport (Ville)*, [1989] 1 R.C.S. 705, *Barratt c. District of North Vancouver*, [1980] 2 R.C.S. 418, et *Just*, précité, et peuvent se résumer comme suit :
>
> > Les véritables décisions de politique générale comportent des facteurs sociaux, politiques et économiques. Lorsqu'elle prend des décisions de cette nature, l'autorité publique s'efforce d'établir un équilibre entre l'efficacité et l'économie, dans le cadre de la planification et de la détermination préalable des limites de ses engagements et de leur mise en oeuvre réelle. Les véritables décisions de politique générale seront habituellement dictées par des considérations ou des contraintes d'ordre financier, économique, social et politique.
> >
> > L'aspect opérationnel est celui de la mise en oeuvre pratique des politiques ainsi formulées; il concerne principalement l'exécution ou l'implantation d'une politique. Les décisions opérationnelles sont habituellement le produit d'une directive administrative, de l'opinion d'un expert ou d'un professionnel, ou encore de normes techniques ou de la norme générale de ce qui est raisonnable.

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125 Rowling v. Takaro Properties Ltd., [1988] A.C. 473.

126 Brown c. Colombie-Britannique (Ministre des Transports et de la Voirie), [1994] 1 R.C.S. 420; Swinamer c. Nouvelle-Écosse (Procureur général), [1994] 1 R.C.S. 445.

127 *Ibid.*, à la p. 441.

Évidemment, la distinction entre une décision de politique générale et une décision opérationnelle ne s'applique que s'il est déterminé, au préalable, que la décision est *intra vires*. Le juge Stone le précise dans l'arrêt *Comeau's Sea Foods Ltd. c. Canada* :

> L'hypothèse sous-jacente semble être que l'autorité publique a pris sa décision, indépendamment de la nature politique ou opérationnelle de celle-ci, conformément à l'exercice d'un pouvoir accordé par le législateur. Si cette décision excède les pouvoirs accordés par la loi, à mon point de vue, elle ne peut être protégée par le fait qu'il s'agit d'une décision « de politique » tout simplement parce qu'il n'y aurait rien à protéger.[128]

Il s'ensuit que la communication contraire à la convention ou à la loi applicable engage la responsabilité de la Couronne peu importe qu'elle soit le fait du ministre du Revenu national ou du Cabinet et découle d'une décision de politique générale.

Lorsque la décision est conforme au pouvoir conféré par la loi, le critère de distinction entre une décision de politique générale et une décision opérationnelle doit être appliqué. Tel est notamment le cas lorsqu'il y a négligence dans l'application de la loi. Dans ce dernier cas, la situation la plus problématique est celle de l'exercice négligent d'un pouvoir discrétionnaire.

L'analyse qui précède des restrictions apportées à la communication de renseignements dans l'application de la convention Canada-É.-U. fait ressortir que, sous de nombreux rapports importants, comme le secret commercial et professionnel, le Canada a le pouvoir discrétionnaire de ne pas communiquer les renseignements. La question de savoir si l'exercice de ce pouvoir discrétionnaire, lorsqu'un préjudice en résulte, engage la responsabilité de l'administration compétente, ne peut être tranchée facilement.

D'une part, le pouvoir discrétionnaire est exercé selon les faits de l'espèce en application de la convention Canada-É.-U., de sorte qu'il ne peut s'agir d'une véritable décision de politique générale. D'autre part, il s'agit jusqu'à un certain point d'une décision de politique générale étant donné que la communication peut avoir pour but d'obtenir ultérieurement un traitement réciproque de la part de l'État cocontractant dans des circonstances semblables.

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128 *R. v. Comeau Sea Foods Limited,* [1995] 2 C.F., 467 à la p. 477.

E. Garanties

(i) Canada

Les garanties prévues dans la LIR consistent en ce qu'un renseignement ne peut être communiqué qu'aux fins énoncées au paragraphe 241(4). Lorsqu'un renseignement est communiqué à une autre fin, la personne qui le communique et celle qui l'utilise sciemment à une autre fin s'exposent à une peine.

(ii) États-Unis

Le Code prévoit expressément la protection des renseignements confidentiels communiqués conformément à l'article 6103. En fait, pour recevoir une déclaration ou de l'information relative à une déclaration un organisme doit établir puis tenir, à la satisfaction du secrétaire, un registre permanent des demandes présentées faisant état des motifs invoqués à l'appui, des dates auxquelles les demandes ont été formulées et de la teneur des renseignements communiqués. En outre, l'organisme doit être doté d'un lieu sûr pour y conserver la déclaration ou l'information y afférente communiquée. Seules les personnes dont les fonctions ou les obligations l'exigent ont accès à cette information. De plus, le Code dispose que le secrétaire peut établir les mesures de protection supplémentaires qu'il juge nécessaires pour assurer la confidentialité de l'information communiquée, et l'organisme doit s'y conformer[129].

(iii) Convention Canada-É.-U.

L'information obtenue ne peut être communiquée qu'à une personne chargée de la cotisation, de la perception ou de l'exécution relativement aux impôts visés par la Convention Canada-É.-U.; elle ne peut être utilisée qu'à ces fins.

5. CONCLUSION

Dans les domaines du droit des valeurs mobilières et du droit fiscal, des règles ont été établies en matière de confidentialité et d'entraide de façon à ce que l'autorité publique compétente, qu'il s'agisse de la commission des valeurs mobilières ou du ministre du Revenu,

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129 *Article 6103 du Code.*

soit investie du pouvoir de déterminer si les renseignements seront communiqués ou non à l'autorité étrangère.

La plupart des renseignements échangés dans le domaine des valeurs mobilières le sont de manière informelle. Bien qu'il établisse la marche à suivre pour obtenir de l'aide ou échanger des renseignements, le protocole d'entente a pour objet principal de confirmer l'intention des parties, c'est-à-dire collaborer l'une avec l'autre et fournir renseignements et assistance dans la plus grande mesure possible. Par conséquent, les renseignements sont généralement échangés suivant une procédure informelle, non écrite.

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ANNEXE A

BULLETIN SUR LA CONFIDENTIALITÉ

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Date de diffusion - 1996-06-06

CONFIDENTIALITÉ ET ENTRAIDE DANS LE CONTRÔLE D'APPLICATION DES LOIS SUR LA CONCURRENCE

1. Généralités

La confidentialité des renseignements obtenus en application de la *Loi* est actuellement assurée par l'art. 29 de la *Loi*. Cette disposition interdit la communication de certaines catégories précises de renseignements, <<sauf à un organisme canadien chargé du contrôle d'application de la loi ou dans le cadre de l'application ou du contrôle d'application>> de la *Loi*. Cette interdiction ne s'applique pas aux renseignements qui sont devenus publics. En outre, le par. 10(3) stipule que toutes les enquêtes du directeur doivent être conduites en privé.

Les intervenants ont plusieurs inquiétudes au sujet de la protection du caractère confidentiel des renseignements obtenus par le directeur dans le cadre de l'application ou du contrôle d'application de la *Loi*. Premièrement, la protection accordée aux renseignements confidentiels obtenus en appli cation de la *Loi* n'est pas absolue. À titre d'exemple, l'art. 29 ne protège pas les renseignements qui sont fournis au Bureau sur une base volontaire.

Deuxièmement, les avis sont partagés sur la mesure dans laquelle l'art. 29 autorise le Bureau à communiquer des renseignements confidentiels. D'une part, la communication de renseignements confidentiels de façon sélective par des organismes d'application de la loi à une tierce partie et à d'autres organismes d'application de la loi dans le but de faire progresser leur enquête est courante et souvent nécessaire pour garantir un contrôle d'application efficace de la loi. D'autre part, les renseignements qui sont utiles pour mener une enquête en vertu de la *Loi* sont souvent névralgiques sur le plan commercial. S'ils venaient sans discernement à la connaissance de concurrents ou d'autres parties, cela pourrait nuire aux intérêts commerciaux de la source d'information.

Troisièmement, la communication de renseignements à une autorité étrangère compétente en matière de concurrence risque de donner lieu à des poursuites antitrusts privées en dehors du Canada, en particulier aux États-Unis. Des craintes ont également été exprimées au sujet de l'atteinte possible aux intérêts nationaux du Canada si ces renseignements sont fournis à d'autres organismes d'un gouvernement étranger.

Enfin, il y a la question de la place et de l'étendue de la coopération internationale en matière d'antitrust à la lumière de l'adoption par le Canada de lois visant à faire obstacle à l'application extraterritoriale de lois étrangères. Il s'est opéré un mouvement inverse plus récemment avec les enquêtes conjointes menées par le Bureau et la division antitrust du ministère de la Justice des États -Unis. Les renseignements confidentiels qui ont été mis en commun ont abouti à des mesures d'application qui n'auraient pu être prises sans cette coopération. Ce nouvel esprit de coo pération se reflète également dans l'accord que le Canada et les États-Unis ont conclu en août 1995 au sujet de l'application de leurs lois sur la concurrence et sur les

pratiques commerciales déloyales.

Par conséquent, il convient d'assurer l'équilibre entre le contrôle d'application efficace de la loi et les inquiétudes des sources d'information.

2. Les consultations publiques

Le document de travail invitait les intéressés à soumettre des observations sur plusieurs questions ayant trait à la confidentialité et à l'entraide. Sur le plan intérieur, ces questions étaient les suivantes:

tous les renseignements qui se trouvent en la possession du directeur, y compris ceux fournis sur une base volontaire, devraient-ils bénéficier de la même protection légale;

comment la *Loi* devrait-elle être modifiée en ce qui concerne le pouvoir du directeur de communiquer des renseignements confidentiels dans les cas suivants:

pour faire progresser une enquête ou contribuer à l'application de la *Loi*;

pour négocier un autre méthode de règlement des affaires;

pour déterminer la valeur d'un élément de preuve ou la crédibilité d'un témoin en communiquant des renseignements confidentiels à des membres de l'industrie;

pour rétablir les faits en intervenant de la manière prévue aux art. 125 et 126 lorsqu'une partie trompe un tribunal.

comment la *Loi* devrait-elle être modifiée en ce qui concerne le pouvoir du directeur d e renvoyer à d'autres organismes gouvernementaux des plaintes qui relèvent de leur compétence;

comment la *Loi* devrait-elle être modifiée en ce qui concerne le pouvoir du directeur de communiquer des renseignements qui se trouvent en sa possession afin d'aider un organisme canadien chargé du contrôle d'application de la loi à s'acquitter de ses fonctions.

Le document de travail invitait également les intéressés à faire des commentaires sur un régime d'entraide qui permettrait de communiquer des renseignements confidentiels à des organismes étrangers compétents en matière de concurrence dans le cadre d'une enquête menée par le Bureau ou d'une enquête conjointe, ou pour aider un organisme étranger compétent en matière de concurrence dans son enquête. L'entraide pourrait consister à autoriser le directeur à faire les choses suivantes:

recourir à des mesures officielles de contrainte en vue d'obtenir des renseignements pour le contrôle d'application des lois sur la concurrence d'un autre pays;

fournir à un organisme étranger des renseignements utiles pour contrôler l'appl ication de la *Loi* ou des lois sur la concurrence d'un autre pays.

Le Bureau posait les questions suivantes aux destinataires du document de travail:

une telle entraide est-elle généralement dans l'intérêt public;

quelles sont les mesures de protection qui permettraient d'éviter qu'il y ait entraide dans les cas où ce serait

contraire à l'intérêt public;

devrait-on permettre l'utilisation des différentes mesures officielles de contrainte prévues par la*Loi* pour venir en aide à des autorités étrangères;

certaines catégories de renseignements devraient-elles faire l'objet d'une exemption de com munication en vertu d'un accord d'entraide et comment devrait-on définir les renseignements ainsi protégés sans nuire indûment à l'efficacité de la coopération;

quelles mesures de protection s'imposent pour faire en sorte que les renseignements communiqués à un organisme étranger ne soient pas utilisés ni transmis à une tierce partie à d'autres fins que le contrôle d'application de la loi relative à la concurrence de l'autre pays;

quels facteurs devraient être pris en considération pour décider s'il y a lieu de conclure un accord d'entraide dans le cadre du régime proposé?

Les personnes qui ont présenté des observations ont majoritairement reconnu que la disposition de la*Loi* portant sur la confidentialité des renseignements devrait s'appliquer à tous les renseignements qui se trouvent en la possession du Bureau. Toutefois, les opposants à l'octroi d'un pouvoir discrétionnaire étendu au Bureau en ce qui a trait à la communication de renseignements confidentiels sur le plan intérieur ont été plus nombreux que les partisans de cette mesure. La préférence a été donnée à un ensemble strictement défini de circonstances en dehors desquelles la communication de ces renseignements serait interdite. Des avis contraires ont été exprimés sur le pouvoir du Bureau de renvoyer une plainte. Ceux qui s'y opposaient ont mis en doute l'utilité d'un tel pouvoir.

Les réactions étaient également partagées sur la question de savoir s'il est dans l'intérêt public que le Bureau communique des renseignements qu'il a en sa possession à des organismes canadiens chargés du contrôle d'application de la loi pour les aider à s'acquitter de leurs fonctions. En fait, certaines personnes considèrent que le pouvoir du Bureau de communiquer des renseignements à ces organismes devrait être restreint étant donné que les compétences du Bureau ressortissent au droit de la concurrence et non à d'autres domaines d'application de la loi.

Une grande majorité de personnes a indiqué que l'entraide avec des autorités étrangères compétentes en matière de concurrence est généralement dans l'intérêt public. Toutefois, l'appui des représentants de la communauté juridique et des milieux d'affaires a généralement été subordonné à la présence d'importantes mesures de protection et de restrictions dans le régime d'entraide. Certains ont mentionné qu'un examen par un juge et par le procureur général du Canada serait souhaitable, de même que l'obtention du consentement de la partie touchée.

Tous les intéressés ont généralement convenu que le recours aux différentes mesures officielles de contrainte prévues par la *Loi* pour venir en aide à des autorités étrangères devrait être permis. Toutefois, une importante minorité a mentionné que les affaires civiles devraient être exclues d'un régime d'entraide.

En général, les intéressés ont estimé que, lorsque la communication de renseignements appartenant à certaines catégories est interdite par la loi qui régit une autorité étrangère compétente en matière de concurrence, ces mêmes renseignements devraient faire l'objet d'une exemption de communication par le Bureau. De façon générale, les intéressés ont considéré la réciprocité comme une condition*sine qua non* à cet égard.

Plusieurs mesures de protection ont été suggérées pour faire en sorte que les renseign ements

communiqués à une autorité étrangère ne soient ni utilisés ni transmis à une tierce partie à d'autres fins que l'application du droit de la concurrence de l'autre pays, ou ne soient pas transmis à des parties privées qui ont intenté une poursuite dans le domaine du droit de la concurrence. Enfin, des intéressés ont, de leur propre initiative, fourni des précisions sur d'autres facteurs dont il faudrait tenir compte pour déterminer s'il y a lieu de conclure un accord d'entraide avec un pays en particulier.

3. Le Comité consultatif

Les délibérations du Comité ont porté sur trois grandes questions:

1) le cadre général de la protection des renseignements fournis au directeur;

2) le régime de confidentialité applicable aux affaires intérieures qui ne comportent pas un volet international;

3) la confidentialité en ce qui concerne les affaires comportant une coopération avec d'autres juridictions.

Cadre général de la protection

À l'heure actuelle, certaines catégories de renseignements sont protégées par l'art. 29 de la*Loi*. Cependant, cette protection ne s'applique pas aux renseignements fournis au Bureau sur une base volontaire. Vu le caractère névralgique sur le plan commercial des renseignements obtenus par le Bureau dans le cadre de l'application ou du contrôle d'application de la*Loi* ainsi que le droit à la protection de la vie privée, le Comité a conclu que la *Loi* devrait protéger tous ces renseignements. Ne bénéficieraient pas de cette protection les renseignements publics ou les renseignements que les parties consentent à communiquer.

Le Comité a jugé qu'il est important de garantir l'observation du nouveau régime de confidentialité. C'est pourquoi il a recommandé de créer dans la *Loi* une disposition interdisant la communication intentionnelle de renseignements.

Affaires intérieures
Communication dans le cadre de <<l'application ou du contrôle d'application>>

À l'heure actuelle, certains renseignements confidentiels peuvent être communiqués en application de l'art. 29 de la *Loi* <<dans le cadre de l'application ou du contrôle d'application>> de la*Loi*. Certains membres du Comité ont souscrit à l'affirmation du Bureau selon laquelle le directeur a besoin de latitude à ce chapitre pour communiquer des renseignements à des membres d'une industrie canadienne afin de faire progresser une enquête menée en vertu de la *Loi*. Toutefois, d'autres membres ont estimé que la *Loi* devrait préciser quelles communications devraient être autorisées dans le cadre de <<l'application ou du contrôle d'application>>. Étant donné que certains membres du Comité accorderaient un pouvoir discrétionnaire plus étendu au directeur, le Comité est arrivé au consensus que le directeur devrait pouvoir effectuer les communications suivantes:

entre le directeur et son personnel, ses représentants et le procureur général du Canada;

à un tribunal ou au Tribunal de la concurrence dans le cadre de procédures d'application de la loi ou d'une communication aux parties à ces procédures;

à la cible d'une enquête dans le cadre de négociations en vue d'un règlement;

lorsque s'agissant d'un document, la communication est à l'auteur apparent du document, à son ou ses destinataires, ou aux personnes mentionnées dans le document.

Autres communications autorisées

Les renseignements communiqués à des organismes canadiens chargés du contrôle d'application de la loi ne bénéficient pas non plus de la protection prévue à l'article 29 de la*Loi*. Le Comité est arrivé au consensus que la communication de renseignements par le Bureau devrait être autorisée dans les cas suivants:

transmission des renseignements ayant trait à une plainte aux organismes compétents;

notification de gouvernements étrangers en vertu d'accords ou arrangements internationaux 1;

communication de renseignements à un organisme canadien chargé du contrôle d'application de la loi.

De plus, le Comité est arrivé au consensus que la*Loi* ne devrait *pas* autoriser expressément le Bu reau à communiquer des renseignements obtenus dans le cadre du contrôle d'application de la*Loi* au cours d'interventions du directeur dans le cadre des procédures prévues aux art. 125 et 126.

Affaires comportant un volet international
Mesures de protection et exigences concernant l'intérêt public

Le Comité a examiné la place de la coopération internationale dans le domaine de l'application des lois sur la concurrence et a conclu que l'échange limité de renseignements est justifié dans le monde interdépendant d'aujourd'hui. Il a appuyé le principe d'une entraide juridique fondée sur la réciprocité avec des autorités étrangères compétentes en matière de concurrence. Plus précisément, l'échange de renseignements avec un autre pays devrait être autorisé en vertu d'accords d'entraide juridique conclus avec des gouvernements étrangers ou des organismes étrangers compétents en matière de concurrence. Ces accords devraient être publiés, et une période de commentaires devrait être prévue avant leur entrée en vigueur pour permettre au public de présenter des observations sur les dispositions qu'ils renferment. Pour garantir que cette assistance est dans l'intérêt public du Canada, des exigences minimales devraient être prévues dans la*Loi*:

(i) un accord d'entraide ne doit être conclu qu'avec un pays dont les lois sur la concurrence sont sensiblement similaires à celles du Canada;

(ii) un accord d'entraide doit prévoir la réciprocité en ce qui a trait à l'étendue de l'assistance que se fourniront les deux gouvernements;

(iii) un accord d'entraide doit obliger la partie étrangère à se conformer aux conditions imposées quant à l'utilisation des renseignements et à leur retour.

En outre, lorsque la communication de renseignements est proposée à l'égard seulement d'une affaire étrangère en matière de concurrence, l'accord d'entraide doit prévoir que cette communica tion doit être approuvée par le ministre de la Justice, qui pourrait opposer un refus si l'intérêt public du Canada le dictait.

En ce qui concerne la communication de renseignements à des autorités étrangères compétentes en matière de concurrence, le Comité a conclu que la*Loi* devrait également prévoir que les mesures de protection suivantes s'appliqueront:

(i) les renseignements fournis par le Canada bénéficieraient, dans la juridiction étrangère, d'une protection au chapitre de la confidentialité qui est sensiblement similaire à celle fournie par le Canada;

(ii) les renseignements fournis par le Canada ne seraient utilisés par l'autorité étrangère compétente en matière de concurrence que dans le cadre du contrôle d'application des lois relatives à la concurrence;

(iii) les droits ou les privilèges applicables seraient maintenus. À titre d'exemple, le droit canadien relatif à l'utilisation de témoignages obtenus forcément serait reconnu et appliqué par le pays destinataire. Un autre exemple serait le secret professionnel liant l'avocat à son client;

(iv) la source qui a fourni l'information serait informée si l'obligation de confidentialité a été violée.

Le Comité a également conclu que des sanctions devraient être prévues en cas de violation d'une obligation de confidentialité. Suivant la nature de la violation, ces sanctions pourraient comprendre le retrait de l'autorisation d'utiliser les renseignements dans la juridiction étrangère et le retour des renseignements.

Mécanismes de surveillance - Enquêtes canadiennes en matière de concurrence

Le Comité a longuement examiné la question de savoir quels autres mécanismes de surveillance, s'il en est, en plus des mesures de protection précitées, s'imposent pour garantir la responsabilité lorsque des accords d'entraide sont invoqués pour faire progresser une enquête canadienne.

Certains membres ont considéré qu'il était crucial de ne pas communiquer à un autre pays les renseignements recueillis dans le cadre d'une enquête menée par le Bureau, même lorsqu'ont été respectées les mesures de protection et les exigences concernant l'intérêt public précitées, sans avoir obtenu l'autorisation d'un tribunal au terme d'une audience convoquée sur présentation d'un avis à la source d'information et à la cible ou aux cibles de l'enquête. Une telle audience serait conçue de manière à ne pas être trop coûteuse ni trop lourde. Cette façon de procéder garantirait la responsabilité du gouvernement. La présentation de l'avis pourrait être différée jusqu'à ce que le Bureau détermine que cela ne risque plus de nuire à l'enquête. Une suggestion à cet égard serait de convoquer l'audience devant un juge dans les 30 jours qui suivent la présentation de l'avis, sans droit d'appel. À l'audience, le juge pourrait ordonner l retour des renseignements ou imposer des restrictions quant à leur utilisation. L'objet de cette audience judiciaire serait de garantir le respect des mesures de protection prévues par la loi.

Par contre, d'autres membres ont estimé qu'il s'agissait d'une démarche encore trop lourde qui pourrait occasionner des coûts et des retards inutiles et ne pas donner grand chose au chapitre de la protection. Ces membres étaient d'avis que les mesures de protection et les exigences concernant l'intérêt public précitées, à l'exclusion de l'examen par le ministre de la Justice, devraient être suffisantes pour protéger convenablement les intérêts de la source d'information. L'examen par le ministre de la Justice ne s'accorderait pas avec les pratiques similaires d'autres organismes canadiens chargés du contrôle d'application de la loi.

Tout compte fait, le Comité a été incapable d'arriver à un consensus sur la question de savoir si la surveillance par une tierce partie, en plus des mesures de protection et des exigences concernant l'intérêt public, était nécessaire lorsque le Bureau désire invoquer un accord d'e ntraide pour faire progresser une enquête canadienne.

Mécanismes de surveillance - Affaires en matière de concurrence étrangère seulement

Le dernier point abordé concerne le traitement du partage de l'information dans le cas d'une affaire en

matière de concurrence étrangère seulement, peu importe que l'information ait été obtenue à la suite d'une demande étrangère ou dans le cadre d'une enquête menée en vertu de la*Loi*. Le Comité est arrivé au consensus que le Bureau devrait procéder en grande partie de la manière prévue dans la*Loi sur l'entraide juridique en matière criminelle* (LEJMC) et demander une autorisation judiciaire avant de communiquer ces renseignements à une autorité étrangère compétente en matière de con currence. L'avis et l'examen judiciaire mentionnés dans la rubrique <<Mécanismes de surveillance - Enquêtes canadiennes en matière c concurrence>> devraient s'appliquer à ces fins, avec les adapta tions nécessaires. Néanmoins, le Bureau devrait en outre toujours aviser une partie qui a déjà fait l'objet de mesures officielles de contrainte à la demande d'une autorité étrangère compétente en matière de concurrence qu'il demande pareille autorisation. Certains membres du Comité ont indiqué que cet avis devrait également être donné à la cible ou aux cibles de l'enquête, tandis que d'autres ont estimé que la procédure prévue dans la*LEJMC* (présentation d'un avis aux sources d'information seulement) était suffisante.

De plus, le Comité est arrivé au consensus que, même en l'absence d'une demande de communica tion de renseignements, le Bureau devrait malgré tout être en mesure de demander l'autorisation de communiquer des renseignements qu'il a en sa possession à une autorité étrangère compétente en matière de concurrence. Toutefois, cette communication ne devrait être permise que si la juridiction étrangère est disposée à rendre la réciproque 2 et que si les renseignements doivent être communiqués pour faire progresser une enquête étrangère en cours. Le Bureau ne devrait pas être autorisé à fournir des renseignements qui déclenchent une nouvelle enquête étrangère.

Pour ce qui est d'autoriser la communication de renseignements à une autorité étrangère compétente en matière de concurrence, des conditions pourraient être imposées à l'audience, notamment celles -ci:

(i) la nécessité de donner suite à une demande;

(ii) la conservation et le retour au Canada d'un document ou d'un objet saisi;

(iii) la protection des intérêts d'une tierce partie;

(iv) l'adoption d'autres mesures de protection, par exemple des restrictions touchant leur utilisa tion.

4. Recommandations

Cadre général de la protection

1) Tous les renseignements obtenus par le Bureau dans le cadre de l'application ou du contrôle d'application de la*Loi* devraient être considérés comme confidentiels. Ne bénéficieraient pas de cette protection les renseignements publics ou les renseignements que les parties consentent à communiquer.

2) Une nouvelle disposition interdisant la communication intentionnelle de renseignements devrait être créée dans la *Loi*.

Affaires intérieures
Communication dans le cadre de <<l'application ou du contrôle d'application>> de la *Loi*

3) Le directeur devrait étudier davantage quelles communications devraient être permises sous la rubrique <<application ou contrôle d'application>> de la*Loi*. Étant donné que certains membres du Comité

accorderaient un pouvoir discrétionnaire plus étendu au directeur, le Comité est arrivé au consensus que le directeur devrait pouvoir effectuer les communications suivantes:

entre le directeur et son personnel, ses représentants et le procureur général du Canada;

à un tribunal ou au Tribunal de la concurrence dans le cadre de procédures d'application de la loi ou d'une communication aux parties à ces procédures;

à la cible d'une enquête dans le cadre de négociations en vue d'un règlement;

lorsque s'agissant d'un document, la communication est à l'auteur apparent du document, à son ou ses destinataires, ou aux personnes mentionnées dans le document.

Autres communications autorisées

4) Le Bureau devrait être autorisé à communiquer des renseignements dans les cas suivants:

transmission des renseignements ayant trait à une plainte aux organismes compétents;

notification de gouvernements étrangers en vertu d'accords ou arrangements internationaux, sous réserve des dispositions de la *Loi* relatives à la confidentialité;

communication de renseignements à un organisme canadien chargé du contrôle d'application de la loi.

5) La *Loi* ne devrait pas autoriser expressément le Bureau à communiquer des renseignements obtenus dans le cadre du contrôle d'application de la *Loi* au cours d'interventions du directeur dans le cadre des procédures prévues aux art. 125 et 126.

Affaires comportant un volet international
Mesures de protection et exigences concernant l'intérêt public

6) L'échange de renseignements avec un autre pays intéressé à faire de même devrait être autorisé en vertu d'accords d'entraide juridique conclus avec des gouvernements étrangers ou des organismes étrangers compétents en matière de concurrence. Ces accords devraient être publiés, et une période de commentaires devrait être prévue avant leur entrée en vigueur. Pour garantir que cette entraide est dans l'intérêt public du Canada, des exigences minimales devraient être prévues dans la *Loi*:

(i) un accord d'entraide ne doit être conclu qu'avec un pays dont les lois sur la concurrence sont sensiblement similaires à celle du Canada;

(ii) un accord d'entraide doit prévoir la réciprocité en ce qui a trait à l'étendue de l'assistance que se fourniront les deux gouvernements;

(iii) un accord d'entraide doit obliger la partie étrangère à se conformer aux conditions imposées quant à l'utilisation des renseignements et à leur retour.

Lorsqu'il s'agit d'une communication de renseignements à l'égard seulement d'une affaire étrangère en matière de concurrence, l'accord d'entraide doit prévoir que cette communication doit être approuvée par le ministre de la Justice, qui pourrait opposer un refus si l'intérêt public du Canada le dictait.

7) En ce qui concerne la communication de renseignements à des autorités étrangères compétentes en matière de concurrence, la *Loi* devrait également prévoir que les mesures de protec tion suivantes s'appliqueront:

(i) les renseignements fournis par le Canada bénéficieraient, dans la juridiction étrangère, d'une protection au chapitre de la confidentialité qui est sensiblement similaire à celle fournie par le Canada;

(ii) les renseignements fournis par le Canada ne seraient utilisés par l'autorité étrangère compétente en matière de concurrence que dans le cadre du contrôle d'application des lois relatives à la concurrence;

(iii) les droits ou les privilèges applicables seraient maintenus. À titre d'exemple, le droit canadien relatif à l'utilisation de témoignages obtenus forcément serait reconnu et appliqué par le pays destinataire. Un autre exemple serait le secret professionnel liant l'avocat à son client;

(iv) la source qui a fourni l'information devrait être avisée si l'obligation de confidentialité est violée.

8) Des sanctions devraient être prévues en cas de violation d'une obligation de confidentialité.

Mécanismes de surveillance - Enquêtes canadiennes ou conjointes en matière de concurrence

9) Vu les divergences d'opinions à ce sujet, le directeur devrait approfondir la question de savoir quels autres mécanismes de surveillance, s'il en est, en plus des mesures de protection et des exi gences concernant l'intérêt public (sauf l'examen par le ministre de la Justice), s'imposent lorsque la communication de renseignements confidentiels est proposée pour faire progresser une enquête canadienne.

Mécanismes de surveillance - Affaires en matière de concurrence étrangère seulement

10) Le Bureau devrait en grande partie adopter l'approche prévue dans la *Loi sur l'entraide juridique en matière criminelle* (LEJMC) et demander une autorisation judiciaire avant de communiquer des renseignements confidentiels à une autorité étrangère compétente en matière de concurrence, qu'une demande ait ou non été présentée.

11) La source qui a fourni l'information devrait être avisée de la présentation d'une demande visant à obtenir l'autorisation de communiquer des renseignements à une autorité étrangère compétente en matière de concurrence, à moins que cela ne nuise à l'enquête en cours. Dans ce dernier cas, le Bureau devrait aviser la source d'information aussitôt que possible après que l'enquête ne serait plus menacée ou dans tout délai plus court qu'un tribunal prévoit. Cependant, le Bureau devrait toujours aviser une partie à l'encontre de laquelle les mesures officielles de contrainte de la*Loi* ont déjà été utilisées de la demande d'une autorité étrangère compétente en matière de concurrence.

12) Pour ce qui est d'autoriser la communication de renseignements à une autorité étrangère compétente en matière de concurrence, des conditions pourraient être imposées à l'audience, notamment celles-ci:

(i) la nécessité de donner suite à une demande;

(ii) la conservation et le retour au Canada d'un document ou d'un objet saisi;

(iii) la protection des intérêts d'une tierce partie;

(iv) l'adoption d'autres mesures de protection, par exemple des restrictions touchant leur utilisa tion.

Aide Quoi de neuf Carte du site Opinion Contexte English Haut de la page

Canada
http://strategis.ic.gc.ca

ANNEXE B

PROTOCOLE D'ENTENTE

ENTENTE AVEC LA SECURITIES AND EXCHANGE COMMISSION CONCERNANT LA COOPÉRATION DANS L'APPLICATION DES LOIS

Référence : Bulletin hebdomadaire : 1988-01-15, Vol. XIX n° 3, page 11

ENTENTE

La Securities and Exchange Commission des États-Unis, l'Ontario Securities Commission, la Commission des valeurs mobilières du Québec et la British Columbia Securities Commission, reconnaissant le développement des activités internationales sur les marchés de valeurs et le besoin correspondant de coopération mutuelle en matière d'administration et d'application des lois sur les valeurs mobilières des États-Unis et du Canada, ont conclu l'entente qui suit concernant les demandes d'assistance qui y sont prévues, faites par la Securities and Exchange Commission à une autorité canadienne de réglementation des valeurs mobilières ou vice versa:

Article 1 - Définitions

1. Pour l'application de la présente entente, il faut entendre par:

a) « autorité » :

i) la Securities and Exchange Commission des États-Unis;

ii) l'Ontario Securities Commission, la Commission des valeurs mobilières du Québec, la British Columbia Securities Commission ou toute autre autorité canadienne de réglementation des valeurs mobilières qui devient partie à la présente entente de la manière prévue à l'article 12;

b) « autorité requise » :

i) lorsque l'autorité requérante est la Securities and Exchange Commission des États-Unis, l'autorité canadienne de réglementation des valeurs mobilières à qui une demande est faite en vertu de la présente entente;

ii) lorsque l'autorité requérante est une autorité canadienne de réglementation des valeurs mobilières, la Securities and Exchange Commission des États-Unis;

c) « autorité requérante » : l'autorité qui formule une demande conformément à la présente entente;

d) « personne » : une personne physique ou morale, un groupe dépourvu de la personnalité, un État, une subdivision politique, un organisme ou une émanation d'un État;

e) « émetteur » : une personne qui émet ou se propose d'émettre des valeurs mobilières;

f) firme de valeurs » : un conseiller en valeurs, des services de conseil en valeurs, un organisme de placement collectif en valeurs mobilières, une autre firme de placement collectif en valeurs mobilières, une firme de placement de valeurs, un courtier ou une firme de nature équivalente;

g) « firme de traitement de valeurs » : une chambre de compensation ou un agent chargé des transferts de valeurs mobilières;

h) « lois ou règlements » : les lois, règlements et autres normes en matière de valeurs mobilières qui sont applicables dans l'État intéressé, notamment:

i) l'utilisation d'information privilégiée;

ii) l'information fausse ou trompeuse ou l'emploi de pratiques frauduleuses ou trompeuses ou de manipulations à l'occasion de l'offre, de l'achat ou de la vente de valeurs mobilières;

iii) les obligations imposées à des personnes en matière d'information périodique ou de changement de contrôle;

iv) les obligations imposées aux personnes, aux émetteurs ou aux firmes de valeurs de fournir aux investisseurs une information complète et appropriée;

v) les obligations imposées aux firmes de valeurs et aux firmes de traitement de valeurs concernant notamment leur situation financière ou leur mode de fonctionnement, ainsi que leurs obligations de loyauté dans l'offre et la vente de valeurs ainsi que dans l'exécution d'opérations;

vi) les exigences, notamment financières, à l'égard de ceux qui représentent ou qui contrôlent des émetteurs, des firmes de valeurs ou des firmes de traitement de valeurs.

Article 2 - Étendue de l'assistance

1. Les autorités se fourniront l'une à l'autre l'assistance la plus entière, conformément à la présente entente. Cette assistance sera fournie en vue de faciliter l'exécution des fonctions de surveillance du marché des valeurs et la conduite d'enquêtes, de procédures ou de poursuites dans les cas où une information située dans le territoire de l'autorité requise est nécessaire pour déterminer s'il y a eu contravention aux lois ou règlements de l'autorité requérante, ou pour prouver une telle contravention.

2. L'assistance prévue par la présente entente comprend notamment les éléments suivants:

a) fournir accès à l'information contenue dans les dossiers de l'autorité requise;

b) recueillir le témoignage de personnes;

c) obtenir des documents de personnes.

3. Les autorités reconnaissent qu'elles peuvent ne pas posséder dans tous les cas le pouvoir légal de fournir l'assistance prévue par la présente entente. sous réserve de ces limites de leur pouvoir légal, elles feront tout leur possible pour obtenir l'autorisation nécessaire pour fournir l'assistance prévue par la présente entente.

Article 3 - Principes généraux

1. La présente entente expose une déclaration d'intention des autorités concernant l'échange d'informations entre elles.

2. La signature de la présente entente n'empêche pas une autorité de prendre d'autres mesures que celles prévues par la présente entente pour obtenir une information, un témoignage ou un document situé sur le territoire de l'autre autorité ou se trouvant sous le contrôle d'un ressortissant de l'autre autorité, et qui est nécessaire pour assurer le respect ou l'application de ses lois ou règlements, à la condition que cette autorité:

i) fasse preuve de modération et de réserve en prenant de telles mesures;

ii) dans le cas où l'information est située sur le territoire de l'autre autorité, fasse à celle-ci une demande conformément à la présente entente, ou de toute autre manière, avant de prendre les autres mesures;

iii) avise l'autre autorité, avant de prendre des mesures non prévues par la présente entente;

iv) consulte, sur demande, sur la façon dont ces mesures peuvent affecter les intérêts de l'autre autorité et de son gouvernement.

Malgré ces restrictions:

a) l'autorité requérante peut communiquer avec toute personne se trouvant sur le territoire de l'autorité requise qui accepte volontairement de fournir l'information ou les documents demandés;

b) les demandes portant sur une information qui peut être obtenue d'une source publique sur le territoire de l'autorité requise peuvent être communiquées de manière informelle, sans égard aux conditions de la présente entente.

3. Les dispositions de la présente entente ne font naître aucun droit, direct ou indirect, en faveur d'une personne autre que les autorités, d'obtenir, de supprimer ou d'exclure une information ou de contester l'exécution d'une demande d'assistance faite en vertu de la présente entente.

4. L'autorité requise peut refuser l'assistance prévue par la présente entente pour des motifs reliés à l'intérêt public.

Article 4 - Demandes d'assistance

1. Les demandes d'assistance sont faites par écrit et adressées à l'agent responsable de l'autorité requise, indiqué à l'annexe A.

2. La demande d'assistance comporte les éléments suivants:

a) une description générale des documents, de l'information ou du témoignage que cherche à obtenir l'autorité requérante;

b) une description générale de l'affaire sur laquelle porte la demande et du but en fonction duquel l'information est recherchée;

c) les personnes qui, d'après l'autorité requérante, possèdent l'information recherchée, ou les lieux où on pourrait l'obtenir, si l'autorité requérante les connaît;

d) les dispositions légales applicables à l'affaire sur laquelle porte la demande;

e) le délai de réponse souhaité.

3. La demande d'assistance peut être rejetée si elle n'est pas conforme aux dispositions de la présente entente.

4. En cas d'urgence, les demandes d'assistance et les réponses à ces demandes se font selon une procédure simplifiée ou par des moyens de communication autres que la correspondance, pourvu que toutes ces communications soient confirmées de la manière prévue au présent article.

Article 5 - Exécution des demandes

1. Dans sa demande d'assistance, l'autorité requérante peut désigner les personnes dont elle veut qu'on recueille le témoignage.

2. L'autorité requise ou toute autre personne désignée par elle recueille le témoignage des personnes impliquées, directement ou indirectement, dans l'affaire sur laquelle porte la demande ou possédant des informations qui peuvent aider à l'exécution de la demande, et exige la production de tout autre élément de preuve.

3. Les témoignages sont recueillis de la même manière et dans la même mesure que dans le cours d'enquêtes ou d'autres procédures sur le territoire de l'autorité requise. Malgré toute autre disposition de la présente entente, toute personne qui témoigne par suite d'une demande faite en vertu de la présente entente continue à bénéficier des droits et protections des lois applicables sur le territoire de l'autorité requise. Les prétentions quant aux autres droits et privilèges tirant leur source exclusivement dans le droit applicable sur le territoire de l'autorité requérante seront réservées pour l'examen par les tribunaux compétents sur le territoire de l'autorité requérante.

4. L'accès à l'information contenue dans les dossiers de l'autorité requise sera fourni sur demande de l'autorité requérante.

5. Sur demande de l'autorité requérante, le témoignage sera recueilli sous la foi du serment et une transcription sera établie. En outre, un agent de l'autorité requérante peut assister à la déposition et, sous réserve de l'accord de l'autorité requise et du paragraphe 6, indiquer des questions précises à poser au témoin ou autrement participer à l'interrogatoire du témoin.

6. Sous réserve des conditions suivantes, l'autorité requise peut accéder à la demande faite par l'autorité requérante qu'une personne désignée par cette dernière procède à l'interrogatoire d'une personne:

a) l'autorité requérante indique les raisons de cette demande;

b) la demande peut être accordée ou refusée par l'autorité requise, à sa discrétion et l'autorité requise peut imposer à la participation de l'autorité requérante les conditions qu'elle juge appropriées;

c) si la requête est accordée et si les lois applicables sur le territoire de l'autorité requérante exigent que le conseil du témoin, une partie à la procédure ou son conseil aient la possibilité de poser des questions au témoin, il faut leur permettre de le faire;

d) si la demande est rejetée, les autorités conviennent de se consulter conformément à l'article 8 sur les raisons du refus et sur les conditions auxquelles elle pourrait être accordée.

Article 6 - Utilisation permise de l'information

1. L'autorité requérante ne peut utiliser l'information fournie qu'aux fins suivantes:

a) aux fins indiquées dans la demande et reliée à l'objectif d'assurer le respect ou l'application des lois ou règlements de l'autorité requérante, en particulier les dispositions légales indiquées dans la demande et les dispositions connexes;

b) à des fins qui entrent dans le cadre général de l'utilisation indiquée dans la demande, notamment la conduite d'une instance civile ou administrative, la participation à une poursuite criminelle ou à une instance disciplinaire d'un organisme d'autoréglementation, ou la conduite d'une enquête reliée à de telles procédures, pour toute accusation générale applicable à la contravention aux dispositions visées dans la demande.

2. L'autorité requérante n'utilise pas l'information fournie à une fin autre que celles prévues au paragraphe 1, à moins que l'autorité requise, informée de cette intention, ne s'oppose pas à l'utilisation projetée de l'information. L'autorité requise peut subordonner l'utilisation de l'information à certaines conditions. Si l'autorité requise s'oppose à l'utilisation de l'information, les autorités conviennent de se consulter conformément à l'article 8 sur les raisons du refus et sur les conditions auxquelles l'utilisation proposée pourrait être permise.

Article 7 - Caractère confidentiel des demandes

1. Chaque autorité garde confidentiels les demandes formulées conformément à a présente entente, leur contenu, l'information obtenue en réponse aux demandes et toute autre question reliée à la mise en oeuvre de la présente entente, y compris les consultations entre autorités, dans la mesure permise par la loi, sauf dans le cas de divulgations absolument nécessaires pour exécuter la demande, étant entendu que l'autorité requérante et l'autorité requise peuvent, d'un commun accord, renoncer à ce caractère confidentiel.

2. Les autorités gardent confidentielle, dans la mesure permise par la loi, toute information fournie aux termes de la présente entente, sous réserve du présent paragraphe, à moins qu'elle ne soit divulguée en vue des fins indiquées dans la demande conformément à l'article 6.

3. Sauf dans les cas visés à l'article 6, l'autorité requérante ne doit offrir cette information à aucune autre personne, et elle doit faire de son mieux pour assurer qu'elle ne soit pas obtenue par une autre personne. Sauf accord contraire, si une autre personne obtient cette information, l'autorité requérante fait de son mieux pour assurer que cette autre personne ne l'utilise pas d'une manière qui entraîne sa divulgation à d'autres personnes.

4. L'autorité requérante notifie à l'autorité requise toute demande d'accès à cette information faite au nom d'un droit reconnu légalement, avant de se conformer à la demande, et fait valoir les exceptions et privilèges appropriés concernant cette information.

5. Aussitôt que l'autorité requérante clôt l'affaire pour laquelle elle a demandé assistance dans le cadre de la présente entente, elle retourne à l'autorité requise, dans la mesure permise par la loi, tous les documents et copies qui n'ont pas été divulgués au cours des procédures mentionnées à l'article 6 ainsi que les autres pièces révélant le

contenu de ces documents, sauf les documents élaborés dans le cours du processus de délibération ou d'analyse interne de l'autorité requérante.

6. Tout document ou autre pièce fourni par une autorité en réponse à une demande faite dans le cadre de la présente entente et toute autre pièce en révélant le contenu, sauf les documents élaborés dans le cours du processus de délibération ou d'analyse interne de l'autorité requérante, ne deviennent pas la propriété de celle-ci et doivent être retournés sans retard à l'autorité requise, sur demande de celle-ci, dans la mesure applicable par la loi de l'autorité requérante, sous réserve que l'autorité requise ne puisse faire une telle demande que si elle est fondée à croire que l'information a été divulguée ou utilisée autrement que de la manière prévue à l'article 6, ou le sera probablement.

Article 8 - Différends et consultations

1. En cas de différend sur le sens d'un terme employé dans la présente entente, les autorités définissent le terme conformément aux lois applicables de l'autorité requérante.

2. Les autorités se consultent au sujet de la présente entente en vue d'en améliorer la mise en oeuvre et de résoudre les difficultés qui peuvent survenir. En particulier, les autorités se consultent dans les cas suivants:

a) le refus par une autorité d'accéder à une demande d'information pour les motifs prévus au paragraphe 4 de l'article 3;

b) un changement dans la conjoncture du marché ou de l'économie, ou dans la législation portant sur les matières énumérées au sous-paragraphe 1 h) de l'article 1, ou toute autre difficulté qui rend nécessaire ou approprié de modifier ou d'étendre la présente entente pour en atteindre les objectifs.

3. Les autorités peuvent s'entendre sur les mesures pratiques qui peuvent être nécessaires pour faciliter la mise en oeuvre de la présente entente.

4. Toute condition de la présente entente peut être modifiée, assouplie ou mise de côté d'un commun accord.

Article 9 -Assistance non sollicitée

1. Dans la mesure permise par les lois ou règlements applicables sur son territoire, chaque autorité fera de son mieux pour communiquer à l'autre toute information qu'elle vient à découvrir et qui donne lieu de soupçonner qu'il y a eu, ou qu'il y aura, contravention aux lois ou règlements de l'autre autorité.

Article 10 - Frais d'enquête

1. Si la réponse à une demande d'assistance faite dans le cadre de la présente entente paraît devoir entraîner des frais substantiels, l'autorité requise et l'autorité requérante établissent un accord de partage des frais avant que l'autorité requise ne donne suite à la demande d'assistance.

Article 11 - Droit international

1. La signature de la présente entente ne préjuge pas les positions respectives des autorités et de leurs gouvernements concernant les principes de droit international applicables aux procédures pour obtenir une information située sur le territoire d'une autre autorité comme le prévoit l'article 3.

2. Les autorités reconnaissent que le traité d'entraide juridique en matière pénale entre les gouvernements du Canada et des États-Unis d'Amérique, une fois qu'il sera dûment mis en oeuvre et ratifié, constituera, avec la présente entente, un cadre général des principes et des procédures pour les enquêtes et l'obtention d'information concernant certains types d'infractions aux lois sur les valeurs mobilières.

Article 12 - Signature

1. La présente entente entre en vigueur à compter de la date de sa signature par la Securities and Exchange Commission des États-Unis, l'Ontario Securities Commission, la Commission des valeurs mobilières du Québec et la British Columbia Securities Commission.

2. Toute autorité canadienne de réglementation des valeurs mobilières peut devenir partie à la présente entente en signant un exemplaire de cette entente avec la Securities and Exchange Commission et en notifiant cette signature aux autres autorités canadiennes de réglementation des valeurs mobilières qui sont parties à la présente entente.

Article 13 - Dénonciation

1. Une autorité peut dénoncer la présente entente en donnant aux autres autorités un préavis de 30 jours du fait que la présente entente n'est plus en vigueur à l'égard du domaine de compétence de cette autorité. Si une autorité donne un tel préavis, la présente entente continue de s'appliquer à toutes les demandes d'assistance faites avant la date réelle du préavis jusqu'à ce que l'autorité requérante mette un terme à l'affaire pour laquelle l'assistance était demandée.

Fait le 7 janvier 1988.

Securities and Exchange Commission
des États-Unis

Ontario Securities Commission

D.S. Ruder
Chairman

S.M. Beck
Chairman

British Columbia Securities Commission

Commission des valeurs mobilières du Québec

D. Hyndman
Chairman

P. Guy
Président

ANNEXE A

AGENTS RESPONSABLES

Securities and Exchange Commission des États-Unis
450, 5th Street N.W.
Washington, D.C.
U.S.A. 20549

Téléphone: (202) 272-2900
[A- l'attention de: Director, Division of Enforcement

Ontario Securities Commission
20, Queen Street West
Suite 1800
Toronto (Ontario)
M5H 3S8

Téléphone: (416) 597-0681
À l'attention de: Deputy Director, Enforcement and Market Regulation Branch

Commission des valeurs mobilières du Québec
C.P. 246, Tour de la Bourse
17- étage
Montréal (Québec)
H4Z 1G3

Téléphone: (514) 873-5326
À l'attention de: Directeur des affaires juridiques

British Columbia Securities Commission
Superintendent of Brokers
865, Hornby Street
Suite 1100
Vancouver, B.C.
V6Z 2H4

Téléphone: (604) 660-4800
À l'attention de: Manager of Compliance

ANNEXE C

LOI SUR LA CONVENTION CANADA-ÉTATS-UNIS EN MATIÈRE D'IMPÔTS

"

United States Convention

The Canada-United States Tax Convention Act, 1984, S.C. 1984, c. 20, promulgated the Convention between the two countries, which appeared as Schedule I to the Act, as amended by the Protocols set out in Schedules II and III. The changes brought about by the Protocols have been recorded in the relevant articles of the Convention, but readers should refer to the text of the Protocols (beginning at page 17,201) for the effective dates of these changes. The Act received assent on June 28, 1984 and the Convention entered into force on the exchange of instruments of ratification on 16 August 1984.

Note: Under paragraphs 4 and 5 of Article XXX, certain provisions of the 1942 Convention may be applicable for 1977.

Short title

1. This Act may be cited as the *Canada-United States Tax Convention Act, 1984*.

Definition of "Convention"

2.

In this Act "Convention" means the Convention entered into between the Government of Canada and the Government of the United States, set out in Schedule 1, as amended by the Protocols set out in Schedules II and III.

Convention approved

3.

(1) The Convention is approved and declared to have the force of law in Canada during such period as, by its terms, the Convention is in force.

Inconsistent laws

(2) In the event of any inconsistency between the provisions of this Act, or the Convention, and the provisions of any other law, the provisions of this Act and the Convention prevail to the extent of the inconsistency.

Regulations

(3) The Minister of National Revenue may make such regulations as are necessary for the purpose of carrying out the Convention or for giving effect to any of the provisions thereof.

Promulgation of dates

4.

Notice of the day the Convention comes into force and of the day it ceases to be effective shall be given by proclamation of the Governor in Council published in the *Canada Gazette*.*

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* Proclamation giving notice of the coming into force of this Convention was published in the *Canada Gazette*, Part II, December 12, 1984.

Schedule I

Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital

Canada and the United States of America, desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital, have agreed as follows:

Note: For amendments made by the Third Protocol please refer to the note at the end of each relevant Article.

Article I

Personal Scope

This Convention is generally applicable to persons who are residents of one or both of the Contracting States.

Article II

Taxes Covered

1. This Convention shall apply to taxes on income and on capital imposed on behalf of each Contracting State, irrespective of the manner in which they are levied.
2. The existing taxes to which the Convention shall apply are:
   (a) In the case of Canada, the taxes imposed by the Government of Canada under Parts I, XIII and XIV of the *Income Tax Act*; and
   (b) In the case of the United States, the Federal income taxes imposed by the Internal Revenue Code.
3. The Convention shall apply also to:
   (a) Any identical or substantially similar taxes on income; and
   (b) Taxes on capital

   which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes.
4. Notwithstanding the provisions of paragraphs 2(b) and 3, the Convention shall apply to:
   (a) The United States accumulated earnings tax and personal holding company tax, to the extent, and only to the extent, necessary to implement the provisions of paragraphs 5 and 8 of Article X (Dividends);
   (b) The United States excise taxes imposed with respect to private foundations, to the extent, and only to the extent, necessary to implement the provisions of paragraph 4 of Article XXI (Exempt Organizations); and
   (c) The United States social security taxes, to the extent, and only to the extent, necessary to implement the provisions of paragraph 4 of Article XXIX (Miscellaneous Rules).

Note: *Paragraphs 2 to 4 shall be deleted when the Third Protocol is ratified, and be replaced by the provisions of Article 1 of that Protocol.*

Article III

General Definitions

1. For the purposes of this Convention, unless the context otherwise requires:

(a) When used in a geographical sense, the term "Canada" means the territory of Canada, including any area beyond the territorial seas of Canada which, in accordance with international law and the laws of Canada, is an area within which Canada may exercise rights with respect to the seabed and subsoil and their natural resources;

(b) The term "United States" means:

(i) The United States of America, but does not include Puerto Rico, the Virgin Islands, Guam or any other United States possession or territory; and

(ii) When used in a geographical sense, such term also includes any area beyond the territorial seas of the United States which, in accordance with international law and the laws of the United States, is an area within which the United States may exercise rights with respect to the seabed and subsoil and their natural resources;

(c) The term "Canadian tax" means the Canadian taxes referred to in paragraphs 2(a) and 3(a) of Article II (Taxes Covered);

(d) The term "United States tax" means the United States taxes referred to in paragraphs 2(b) and 3(a) of Article II (Taxes Covered);

(e) The term "person" includes an individual, an estate, a trust, a company and any other body of persons;

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(f) The term "company" means any body corporate or any entity which is treated as a body corporate for tax purposes;

(g) The term "competent authority" means:

(i) In the case of Canada, the Minister of National Revenue or his authorized representative; and

(ii) In the case of the United States, the Secretary of the Treasury or his delegate;

[*(h) The term "international traffic" means any voyage of a ship or aircraft to transport passengers or property except where the principal purpose of the voyage is to transport passengers or property between places within a Contracting State;*]

The foregoing subparagraph was deleted by Article I of the First Protocol and replaced by the following:

(h) The term "international traffic" with reference to a resident of a Contracting State means any voyage of a ship or aircraft to transport passengers or property (whether or not operated or used by that resident) except where the principal purpose of the voyage is to transport passengers or property between places within the other Contracting State;

(i) The term "State" means any national State, whether or not a Contracting State; and

(j) The term "the 1942 Convention" means the Convention and Protocol between Canada and the United States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion in the case of Income Taxes signed at Washington on March 4, 1942, as amended by the Convention signed at Ottawa on June 12, 1950, by the Convention signed at Ottawa on August 8, 1956 and by the Supplementary Convention signed at Washington on October 25, 1966.

2. As regards the application of the Convention by a Contracting State any term not defined therein shall, unless the context otherwise requires and subject to the provisions of Article XXVI (Mutual Agreement Procedure), have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.

Note: *Subparagraphs (c) and (d) are replaced by Article 2 of the Third Protocol.*

Article IV

Residence

1. For the purposes of this convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation or any other criterion of a similar nature, but in the case of an estate or trust, only to the extent that income derived by such estate or trust is liable to tax in that State, either in its hands or in the hands of its beneficiaries.

(This paragraph was judicially considered in *Crown Forest Industries v. The Queen*, 92 DTC 6305 (F.C.T.D.); affd 94 DTC 6107 (C.A.); revd 95 DTC 5389 (S.C.C.). The case digest will be found under Article IV in the commentary section of the United States Convention, which appears in Volume III.)

2. Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

   (a) He shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him; if he has a permanent home available to him in both States or in neither State, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);

   (b) If the Contracting State in which he has his centre of vital interests cannot be determined, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;

   (c) If he has an habitual abode in both States or in neither State, he shall be deemed to be a resident of the Contracting State of which he is a citizen; and

   (d) If he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1 a company is a resident of both Contracting States, then if it was created under the laws in force in a Contracting State, it shall be deemed to be a resident of that State.

4. Where by reason of the provisions of paragraph 1 an estate, trust or other person (other than an individual or a company) is a resident of both Contracting States, the competent authorities of the States shall by mutual agreement endeavour to settle the question and to determine the mode of application of the Convention to such person.

5. Notwithstanding the provisions of the preceding paragraphs, an individual shall be deemed to be a resident of a Contracting State if:

   (a) The individual is an employee of that State or of a political subdivision, local authority or instrumentality thereof rendering services in the discharge of functions of a governmental nature in the other Contracting State or in a third State; and

   (b) The individual is subjected in the first-mentioned State to similar obligations in respect of taxes on income as are residents of the first-mentioned State.

   The spouse and dependent children residing with such an individual and meeting the requirements of subparagraph (b) above shall also be deemed to be residents of the first-mentioned State.

Note: *Paragraphs 1 and 3 are amended by Article 3 of the Third Protocol.*

Article V

Permanent Establishment

1. For the purposes of this convention, the term "permanent establishment" means a fixed place of business through which the business of a Contracting State is wholly or partly carried on.

2. The term "permanent establishment" shall include especially:

   (a) A place of management;

   (b) A branch;

(c) An office;

(d) A factory;

(e) A workshop; and

(f) A mine, an oil or gas well, a quarry or other place of extraction of natural resources.

3. A building site or construction or installation project constitutes a permanent establishment if, but only if, it lasts more than 12 months.

[*4. The use of a drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment if, but only if, such use is for more than 3 months in any twelve-month period.*]

[The next page is 17,105]

The foregoing paragraph was deleted by Article II of the First Protocol and replaced by the following:

4. The use of an installation or drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment if, but only if, such use is for more than three months in any twelve-month period.

5. A person acting in a Contracting State on behalf of a resident of the other Contracting State—other than an agent of an independent status to whom paragraph 7 applies—shall be deemed to be a permanent establishment in the first-mentioned State if such person has, and habitually exercises in that State, an authority to conclude contracts in the name of the resident.

6. Notwithstanding the provisions of paragraphs 1, 2 and 5, the term "permanent establishment" shall be deemed not to include a fixed place of business used solely for, or a person referred to in paragraph 5 engaged solely in, one or more of the following activities:

   (a) The use of facilities for the purpose of storage, display or delivery of goods or merchandise belonging to the resident;

   (b) The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of storage, display or delivery;

   (c) The maintenance of a stock of goods or merchandise belonging to the resident for the purpose of processing by another person;

   (d) The purchase of goods or merchandise, or the collection of information, for the resident; and

   (e) Advertising, the supply of information, scientific research or similar activities which have a preparatory or auxiliary character, for the resident.

7. A resident of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because such resident carries on business in that other State through a broker, general commission agent or any other agent of an independent status, provided that such persons are acting in the ordinary course of their business.

8. The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not constitute either company a permanent establishment of the other.

9. For the purposes of the Convention, the provisions of this Article shall be applied in determining whether any person has a permanent establishment in any State.

This article was judicially considered in *Fowler v. M.N.R.*, 90 DTC 1834 (T.C.C.). The case digest will be found under article 5 in the commentary section of the United States Convention, which appears in Volume III.

This article was judicially considered in *Shahmoon v. M.N.R.*, 75 DTC 275 (T.R.B.). The case digest can be found under article 5 in the commentary section of the United States Convention in Volume III.

Article VI

Income From Real Property

[*1. Income derived by a resident of a Contracting State from real property (including*

income from agriculture or forestry) situated in the other Contracting State may be taxed in that other State.

2. *For the purposes of this Convention, the term "real property" shall have the meaning which it has under the taxation laws of the Contracting State in which the property in question is situated and shall include any option or similar right in respect thereof. The term shall in any case include usufruct of real property and rights to explore for or to exploit mineral deposits, sources and other natural resources; ships and aircraft shall not be regarded as real property.*

3. *The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of real property and to income from the alienation of such property.*]

Article VI was deleted by Article III of the First Protocol and replaced by the following:

1. Income derived by a resident of a Contracting State from real property (including income from agriculture, forestry or other natural resources) situated in the other Contracting State may be taxed in that other State.

2. For the purposes of this Convention, the term "real property" shall have the meaning which it has under the taxation laws of the Contracting State in which the property in question is situated and shall include any option or similar right in respect thereof. The term shall in any case include usufruct of real property, rights to explore for or to exploit mineral deposits, sources and other natural resources and rights to amounts computed by reference to the amount or value or production from such resources; ships and aircraft shall not be regarded as real property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of real property and to income from the alienation of such property.

Article VII

Business Profits

1. The business profits of a resident of a Contracting State shall be taxable only in that State unless the resident carries on business in the other Contracting State through a permanent establishment situated therein. If the resident carries on, or has carried on, business as aforesaid, the business profits of the resident may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2. Subject to the provisions of paragraph 3, where a resident of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the business profits which it might be expected to make if it were a distinct and separate person engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the resident and with any other person related to the resident (within the meaning of paragraph 2 of Article IX (Related Persons)).

3. In determining the business profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment

is situated or elsewhere. Nothing in this paragraph shall require a Contracting State to allow the deduction of any expenditure which, by reason of its nature, is not generally allowed as a deduction under the taxation laws of that State.

4. No business profits shall be attributed to a permanent establishment of a resident of a Contracting State by reason of the use thereof for either the mere purchase of goods or merchandise or the mere provision of executive, managerial or administrative facilities or services for such resident.

5. For the purposes of the preceding paragraphs, the profits to be attributed to a permanent establishment shall be determined by the same method year by year unless there is good and sufficient reason to the contrary.

6. Where business profits include items of income which are dealt with separately in other Articles of this Convention, then the provisions of those Articles shall not be affected by the provisions of this Article.

7. For the purposes of the Convention, the business profits attributable to a permanent establishment shall include only those profits derived from the assets or activities of the permanent establishment.

This article was judicially considered in *Fowler v. M.N.R.*, 90 DTC 1834 (T.C.C.). The case digest will be found under article 7 in the commentary section of the United States Convention, which appears in Volume III.

Article VIII

Transportation

[*1. Notwithstanding the provisions of Article VII (Business Profits) and XIII (Gains), profits derived by a resident of a Contracting State from the operation of ships or aircraft in international traffic, and gains derived by a resident of a Contracting State from the alienation of ships or aircraft used principally in international traffic, shall be exempt from tax in the other Contracting State.*]

The foregoing paragraph was deleted by Article IV of the First Protocol and replaced by the following:

1. Notwithstanding the provisions of Articles VII (Business Profits), XII (Royalties) and XIII (Gains), profits derived by a resident of a Contracting State from the operation of ships or aircraft in international traffic, and gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers (including trailers and related equipment for the transport of containers) used principally in international traffic, shall be exempt from tax in the other Contracting State.

2. For the purposes of this Convention, profits derived by a resident of a Contracting State from the operation of ships or aircraft in international traffic include profits from:

   (a) The rental of ships or aircraft operated in international traffic;

   (b) The use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) used in international traffic; and

   (c) The rental of ships, aircraft or containers (including trailers and related equipment for the transport of containers) provided that such profits are incidental to profits referred to in paragraph 1, 2(a) or 2(b).

3. Notwithstanding the provisions of Article VII (Business Profits), profits derived

by a resident of a Contracting State from a voyage of a ship where the principal purpose of the voyage is to transport passengers or property between places in the other Contracting State may be taxed in that other State.

4. Notwithstanding the provisions of Articles VII (Business Profits) and XII (Royalties), profits of a resident of a Contracting State engaged in the operation of motor vehicles or a railway as a common carrier or a contract carrier derived from:

   (a) The transportation of passengers or property between a point outside the other Contracting State and any other point; or

   (b) The rental of motor vehicles (including trailers) or railway rolling stock, or the use, maintenance or rental of containers (including trailers and related equipment for the transport of containers) used

to transport passengers or property between a point outside the other Contracting State and any other point

shall be exempt from tax in that other Contracting State.

5. The provisions of paragraphs 1, 3 and 4 shall also apply to profits or gains referred to in those paragraphs derived by a resident of a Contracting State from the participation in a pool, a joint business or an international operating agency.

6. Notwithstanding the provisions of Article XII (Royalties), profits derived by a resident of a Contracting State from the use, maintenance or rental of railway rolling stock, motor vehicles, trailers or containers (including trailers and related equipment for the transport of containers) used in the other Contracting State for a period or periods not expected to exceed in the aggregate 183 days in any twelve-month period shall be exempt from tax in the other Contracting State except to the extent that such profits are attributable to a permanent establishment in the other State and liable to tax in the other State by reason of Article VII (Business Profits).

Article IX

Related Persons

1. Where a person in a Contracting State and a person in the other Contracting State are related and where the arrangements between them differ from those which would be made between unrelated persons, each State may adjust the amount of the income, loss or tax payable to reflect the income, deductions, credits or allowances which would, but for those arrangements, have been taken into account in computing such income, loss or tax.

2. For the purposes of this Article, a person shall be deemed to be related to another person if either person participates directly or indirectly in the management or control of the other, or if any third person or persons participate directly or indirectly in the management or control of both.

3. Where an adjustment is made or to be made by a Contracting State in accordance with paragraph 1, the other Contracting State shall (notwithstanding any time or procedural limitations in the domestic law of that other State) make a corresponding adjustment to the income, loss or tax of the related person in that other State if:

   (a) It agrees with the first-mentioned adjustment; and

   (b) Within six years from the end of the taxable year to which the first-mentioned adjustment relates, the competent authority of the other State has been notified of the first-mentioned adjustment.

4. In the event that the notification referred to in paragraph 3 is not given within the time period referred to therein, and if the person to whom the first-mentioned adjustment relates has not received, at least six months prior to the expiration of such time period, notification of such adjustment from the Contracting State which has made or is to make such adjustment that State shall, notwithstanding the provisions of paragraph 1, not make the first-mentioned adjustment to the extent that such adjustment would give rise to double taxation.

5. The provisions of paragraphs 3 and 4 shall not apply in the case of fraud, wilful default or neglect or gross negligence.

Note: *Paragraphs 3 and 4 are replaced by Article 4 of the Third Protocol.*

Article X

Dividends

1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of such dividends, the tax so charged shall not exceed:

   (a) 10 per cent of the gross amount of the dividends if the beneficial owner is a company which owns at least 10 per cent of the voting stock of the company paying the dividends;

   (b) 15 per cent of the gross amount of the dividends in all other cases.

   This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3. The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as income subjected to the same taxation treatment as income from shares by the taxation laws of the State of which the company making the distribution is a resident.

4. The provisions of paragraph 2 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article VII (Business Profits) or Article XIV (Independent Personal Services), as the case may be, shall apply.

5. Where a company is a resident of a Contracting State, the other Contracting State may not impose any tax on the dividends paid by the company, except insofar as such dividends are paid to a resident of the other State or insofar as the holding in respect of which the dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor subject the company's undistributed profits to a tax, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

6. Nothing in this Convention shall be construed as preventing a Contracting State from imposing a tax on the earnings of a company attributable to permanent establishments in that State, in addition to the tax which would be chargeable on the earnings of a company which is a resident of that State, provided that any additional tax so imposed shall not exceed 10 per cent of the amount of such earnings which have not been subjected to such additional tax in previous taxation years.

   For the purposes of this paragraph, the term "earnings" means the amount by which the business profits attributable to permanent establishments in a Contracting State (including gains from the alienation of property forming part of the business property of such permanent establishments) in a year and previous years exceeds the sum of:

   (a) Business losses attributable to such permanent establishments (including

losses from the alienation of property forming part of the business property of such permanent establishments) in such year and previous years;

(b) All taxes, other than the additional tax referred to in this paragraph, imposed on such profits in that State;

(c) The profits reinvested in that State, provided that where that State is Canada, such amount shall be determined in accordance with the existing provisions of the law of Canada regarding the computation of the allowance in respect of investment in property in Canada, and any subsequent modification of those provisions which shall not affect the general principle hereof; and

(d) Five hundred thousand Canadian dollars ($500,000) or its equivalent in United States currency, less any amounts deducted by the company, or by an associated company with respect to the same or a similar business, under this subparagraph (d); for the purposes of this subparagraph (d) a company is associated with another company if one company directly or indirectly controls the other, or both companies are directly or indirectly controlled by the same person or persons, or if the two companies deal with each other not at arm's length.

7. Notwithstanding the provisions of paragraph 5, a Contracting State, other than a Contracting State that imposes the additional tax on earnings referred to in paragraph 6, may tax a dividend paid by a company to the extent that the dividend is attributable to profits earned in taxable years beginning after the date of signature of the Convention if, for the three-year period ending with the close of the company's taxable period preceding the declaration of the dividend (or for such part of that three-year period as the company has been in existence, or for the first taxable year if the dividend was declared in that taxable year), at least 50 per cent of such company's gross income from all sources was included in the computation of the business profits attributable to a permanent establishment which such company had in that State; provided that where a resident of the other Contracting State is the beneficial owner of such dividend any tax so imposed on the dividend shall be subject to the limitations of paragraph 2 or the rules of paragraph 4, as the case may be. .

8. Notwithstanding the provisions of paragraph 5, a company which is a resident of Canada and which has income subject to tax in the United States (without regard to the provisions of the Convention) may be liable to the United States accumulated earnings tax and personal holding company tax but only if 50 per cent or more in value of the outstanding voting shares of the company is owned, directly or indirectly, throughout the last half of its taxable year by citizens or residents of the United States (other than citizens of Canada who do not have immigrant status in the United States or who have not been residents in the United States for more than three taxable years) or by residents of a third State.

Note: *Subparagraph 2(a), paragraphs 6 and 7 are amended by Article 5 of the Third Protocol.*

Article XI

Interest

1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of such interest, the tax so charged shall not exceed 15 per cent of the gross amount of the interest.

3. Notwithstanding the provisions of paragraph 2, interest arising in a Contracting State shall be exempt from tax in that State if:

   (a) The interest is beneficially owned by the other Contracting State, a political subdivision or local authority thereof or an instrumentality of such other State, subdivision or authority, and is not subject to tax by that other State;

   (b) The interest is beneficially owned by a resident of the other Contracting State and is paid with respect to debt obligations issued at arm's length and guaranteed or insured by that other State or a political subdivision thereof or an instrumentality of such other State or subdivision which is not subject to tax by that other State;

   (c) The interest is beneficially owned by a resident of the other Contracting State and is paid by the first-mentioned State, a political subdivision or local authority thereof or an instrumentality of such first-mentioned State, subdivision or authority which is not subject to tax by that first-mentioned State;

   (d) The interest is beneficially owned by a seller who is a resident of the other Contracting State and is paid by a purchaser in connection with the sale on credit of any equipment, merchandise or services, except where the sale is made between persons dealing with each other not at arm's length; or

   (e) The interest is paid by a company created under the laws in force in the other Contracting State with respect to an obligation entered into before the date of signature of this Convention, provided that such interest would have been exempt from tax in the first-mentioned State under Article XII of the 1942 Convention.

4. The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures, as well as income assimilated to income from money lent by the taxation laws of the Contracting State in which the income arises. However, the term "interest" does not include income dealt with in Article X (Dividends).

5. The provisions of paragraphs 2 and 3 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the debt-claim in respect of which the interest is paid is effectively connected with such permanent establishment or fixed base. In such case, the provisions of Article VII (Business Profits) or Article XIV (Independent Personal Services), as the case may be, shall apply.

6. For the purposes of this Article, interest shall be deemed to arise in a Contracting State when the payer is that State itself, or a political subdivision, local authority or resident of that State. Where, however, the person paying the interest, whether he is a resident of a Contracting State or not, has in a State other than that of which he is a resident a permanent establishment or a fixed base in connection with which the indebtedness on which the interest is paid was incurred, and such

interest is borne by such permanent establishment or fixed base, then such interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated and not in the State of which the payer is a resident.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the interest, having regard to the debt-claim for which it is paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of the Convention.

8. Where a resident of a Contracting State pays interest to a person other than a resident of the other Contracting State, that other State may not impose any tax on such interest except insofar as it arises in that other State or insofar as the debt-claim in respect of which the interest is paid is effectively connected with a permanent establishment or a fixed base situated in that other State.

Note: *Paragraph 2 is amended, subparagraph 3(d) is replaced and a new paragraph 9 are amendments found in Article 6 of the Third Protocol.*

Article XII

Royalties

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise, and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of such royalties, the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

The application of the 10 per cent withholding tax was judicially considered in *Crown Forest Industries v. The Queen*, 92 DTC 6305; affd 94 DTC 6107 (C.A.); revd 95 DTC 5389 (S.C.C.), a commentary on which appears in Volume III, relative to Article IV of the Canada-U.S. Tax Convention.

[*3. Notwithstanding the provisions of paragraph 2, copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (but not including royalties in respect of motion picture films and of works on film or videotape for use in connection with television) arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.*]

The foregoing paragraph was deleted by Article V of the First Protocol and replaced by the following:

3. Notwithstanding the provisions of paragraph 2, copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (but not including royalties in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television) arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.

[*4. The term "royalties" as used in this Article means payments of any kind received*

as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including motion picture films and works on film or videotape for use in connection with television), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, tangible personal property or for information concerning industrial, commercial or scientific experience, and, notwithstanding the provisions of Article XIII (Gains), includes gains from the alienation of any intangible property or rights described in this paragraph to the extent that such gains are contingent on the productivity, use or subsequent disposition of such property rights.]

The foregoing paragraph was deleted by Article V of the First Protocol and replaced by the following:

4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including motion pictures and works on film, videotape or other means of reproduction for use in connection with television), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, tangible personal property or for information concerning industrial, commercial or scientific experience, and, notwithstanding the provisions of Article XIII (Gains), includes gains from the alienation of any intangible property or rights described in this paragraph to the extent that such gains are contingent on the productivity, use or subsequent disposition of such property or rights.

5. The provisions of paragraphs 2 and 3 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article VII (Business Profits) or Article XIV (Independent Personal Services), as the case may be, shall apply.

6. For the purposes of this Article, royalties shall be deemed to arise in a Contracting State when the payer is that State itself, or a political subdivision, local authority or resident of that State. However:

   (a) Except as provided in subparagraph (b), where the person paying the royalties, whether he is a resident of a Contracting State or not, has in a State other than that of which he is a resident a permanent establishment or a fixed base in connection with which the obligation to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated and not in the State of which the payer is a resident; and

   [*(b) Where the royalties are for the use of intangible property or tangible personal property in a Contracting State, then such royalties shall be deemed to arise in that State and not in the State of which the payer is a resident.*]

The foregoing subparagraph was deleted by Article V of the First Protocol and replaced by the following:

   (b) Where the royalties are for the use of, or right to use, intangible property or tangible personal property in a Contracting State, then such royalties shall be deemed to arise in that State and not in the State of which the payer is a resident.

7. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention.

8. Where a resident of a Contracting State pays royalties to a person other than a resident of the other Contracting State, that other State may not impose any tax on such royalties except insofar as they arise in that other State or insofar as the right or property in respect of which the royalties are paid is effectively connected with a permanent establishment or a fixed base situated in that other State.

This article was judicially considered in *Brad-Lea Meadows Ltd. v. M.N.R.* (1990), 90 DTC 1269 (T.C.C.). The case digest will be found under article 12 in the commentary section of the United States Convention, which appears in Volume III.

Note: *Paragraphs 3 and 6 are deleted and replaced by new paragraphs in Article 7 of the Third Protocol.*

Article XIII

Gains

1. Gains derived by a resident of a Contracting State from the alienation of real property situated in the other Contracting State may be taxed in that other State.

The procedure under this paragraph and also paragraph 13 was judicially considered in the case of *Kaplan v. The Queen*, 94 DTC 1819. The judge found it difficult to understand why the case had found its way to Court when the method used by the taxpayer was specifically delineated in Interpretation Bulletin IT 173-R2.

2. Gains from the alienation of personal property forming part of the business property of a permanent establishment which a resident of a Contracting State has or had (within the twelve-month period preceding the date of alienation) in the other Contracting State or of personal property pertaining to a fixed base which is or was available (within the twelve-month period preceding the date of alienation) to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment or of such a fixed base, may be taxed in that other State.

[3. *Gains derived by a resident of a Contracting State from the alienation of:*

[The next page is 17,117]

(a) Shares forming part of a substantial interest in the capital stock of a company which is not a resident of that State the value of which shares is derived principally from real property situated in the other Contracting State; or

(b) An interest in a partnership, trust or estate the value of which is derived principally from real property situated in the other Contracting State

may be taxed in that other State, provided that the laws in force in the first-mentioned State at the time of such alienation would, in comparable circumstances, subject to taxation gains derived by a resident of that other State. For the purposes of this paragraph,

(c) The term "real property" includes the shares of a company the value of which shares is derived principally from real property or an interest in a partnership, trust or estate referred to in subparagraph (b), but does not include property (other than mines, oil or gas wells, rental property or property used for agriculture or forestry) in which the business of the company, partnership, trust or estate is carried on; and

(d) A substantial interest exists when the resident and persons related thereto own 10 per cent or more of the shares of any class of the capital stock of a company.]

The foregoing paragraph was deleted by Article VI of the First Protocol and replaced by the following:

3. For the purposes of this Article the term "real property situated in the other Contracting State"

   (a) In the case of real property situated in the United States, means a United States real property interest and real property referred to in Article VI (Income from Real Property) situated in the United States; and

   (b) In the case of real property situated in Canada means:

      (i) Real property referred to in Article VI (Income from Real Property) situated in Canada;

      (ii) A share of the capital stock of a company, the value of whose shares is derived principally from real property situated in Canada; and

      (iii) An interest in a partnership, trust or estate, the value of which is derived principally from real property situated in Canada.

4. Gains from the alienation of any property other than that referred to in paragraphs 1, 2 and 3 shall be taxable only in the Contracting State of which the alienator is a resident.

[5. *The provisions of paragraph 4 shall not affect the right of a Contracting State to levy a tax on gains from the alienation of property derived by an individual who is a resident of the other Contracting State if such individual:*

   (a) Was a resident of the first-mentioned State for 120 months during any period of 20 consecutive years; and

   (b) Was a resident of the first-mentioned State at any time during the ten years immediately preceding the alienation of the property.]

The foregoing paragraph was deleted by Article VI of the First Protocol and replaced by the following:

5. The provisions of paragraph 4 shall not affect the right of a Contracting State to levy tax on gains from the alienation of property derived by an individual who is a resident of the other Contracting State if such individual:

(a) Was a resident of the first-mentioned State for 120 months during any period of 20 consecutive years preceding the alienation of the property; and

(b) Was a resident of the first-mentioned State at any time during the ten years immediately preceding the alienation of the property;

and if such property (or property for which such property was substituted in an alienation the gain on which was not recognized for the purposes of taxation in the first-mentioned State) was owned by the individual at the time he ceased to be a resident of the first-mentioned State.

6. Where an individual (other than a citizen of the United States) who was a resident of Canada became a resident of the United States, in determining his liability to United States taxation in respect of any gain from the alienation of a principal residence in Canada owned by him at the time he ceased to be a resident of Canada, the adjusted basis of such property shall be no less than its fair market value at that time.

7. Where at any time an individual is treated for the purposes of taxation by a Contracting State as having alienated a property and is taxed in that State by reason thereof and the domestic law of the other Contracting State at such time defers (but does not forgive) taxation, that individual may elect in his annual return of income for the year of such alienation to be liable to tax in the other Contracting State in that year as if he had, immediately before that time, sold and repurchased such property for an amount equal to its fair market value at that time.

8. Where a resident of a Contracting State alienates property in the course of a corporate organization, reorganization, amalgamation, division or similar transaction and profit, gain or income with respect to such alienation is not recognized for the purpose of taxation in that State, if requested to do so by the person who acquires the property, the competent authority of the other Contracting State may agree, in order to avoid double taxation and subject to terms and conditions satisfactory to such competent authority, to defer the recognition of the profit, gain or income with respect to such property for the purpose of taxation in that other State until such time and in such manner as may be stipulated in the agreement.

[9. *Where a resident of a Contracting State alienates property which may in accordance with this Article be taxed in the other Contracting State and which was owned by a resident of the first-mentioned State on the date of signature of this Convention, the amount of the gain which is liable to tax in that other State in accordance with this Article shall be reduced by the proportion of the gain attributable (on a monthly basis), or such greater portion of the gain as is shown to the satisfaction of the competent authority of the other State to be reasonably attributable, to the period ending on December 31 of the year in which the Convention enters into force; the provisions of this paragraph shall not apply to property which on the date of signature of the Convention formed part of the business property of a permanent establishment or pertained to a fixed base in the other Contracting State.*]

The foregoing paragraph was deleted by Article VI of the First Protocol and replaced by the following:

9. Where a person who is a resident of a Contracting State alienates a capital asset which may in accordance with this Article be taxed in the other Contracting State and

(a) That person owned the asset on September 26, 1980 and was resident in the first-mentioned State on that date; or

(b) The asset was acquired by that person in an alienation of property which qualified as a non-recognition transaction for the purposes of taxation in that other State;

the amount of the gain which is liable to tax in that other State in accordance with this Article shall be reduced by the proportion of the gain attributable on a monthly basis to the period ending on December 31 of the year in which the Convention enters into force, or such greater portion of the gain as is shown to the satisfaction of the competent authority of the other State to be reasonably attributable to that period. For the purposes of this paragraph the term "non-recognition transaction" includes a transaction to which paragraph 8 applies and, in the case of taxation in the United States, a transaction that would have been a non-recognition transaction but for Sections 897(d) and 897(e) of the Internal Revenue Code. The provisions of this paragraph shall not apply to

(c) An asset that on September 26, 1980 formed part of the business property of a permanent establishment or pertained to a fixed base of a resident of a Contracting State situated in the other Contracting State;

(d) An alienation by a resident of the Contracting State of an asset that was owned at any time after September 26, 1980 and before such alienation by a person who was not at all times after that date while the asset was owned by such person as a resident of that State; or

(e) An alienation of an asset that was acquired by a person at any time after September 26, 1980 and before such alienation in a transaction other than a non-recognition transaction.

Note: *Paragraph 8 is deleted and replaced by a new paragraph in Article 8 of the Third Protocol.*

Article XIV

Independent Personal Services

Income derived by an individual who is a resident of a Contracting State in respect of independent personal services may be taxed in that State. Such income may also be taxed in the other Contracting State if the individual has or had a fixed base regularly available to him in that other State but only to the extent that the income is attributable to the fixed base.

Article XV

Dependent Personal Services

1. Subject to the provisions of Articles XVIII (Pensions and Annuities) and XIX (Government Services), salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in a calendar year in the other Contracting State shall be taxable only in the first-mentioned State if:

(a) Such remuneration does not exceed ten thousand dollars ($10,000) in the currency of that other State; or

(b) The recipient is present in the other Contracting State for a period or periods not exceeding in the aggregate 183 days in that year and the remuneration is not borne by an employer who is a resident of that other State or by a permanent establishment or a fixed base which the employer has in that other State.

3. Notwithstanding the provisions of paragraphs 1 and 2, remuneration derived by a resident of a Contracting State in respect of an employment regularly exercised in more than one State on a ship, aircraft, motor vehicle or train operated by a resident of that Contracting State shall be taxable only in that State.

Article XVI

Artistes and Athletes

1. Notwithstanding the provisions of Articles XIV (Independent Personal Services) and XV (Dependent Personal Services), income derived by a resident of a Contracting State as an entertainer, such as theatre, motion picture, radio or television artiste, or a musician, or as an athlete, from his personal activities such as exercised in the other Contracting State, may be taxed in that other State, except where the amount of the gross receipts derived by such entertainer or athlete, including expenses reimbursed to him or borne on his behalf, from such activities do not exceed fifteen thousand dollars ($15,000) in the currency of that other State for the calendar year concerned.

2. Where income in respect of personal activities exercised by an entertainer or an athlete in his capacity as such accrues not to the entertainer or athlete but to another person, that income may, notwithstanding the provisions of Articles VII (Business Profits), XIV (Independent Personal Services) and XV (Dependent Personal Services), be taxed in the Contracting State in which the activities of the entertainer or athlete are exercised. For the purposes of the preceding sentence, income of an entertainer or athlete shall be deemed not to accrue to another person if it is established that neither the entertainer or athlete, nor persons related thereto, participate directly or indirectly in the profits of such other person in any manner, including the receipt of deferred remuneration, bonuses, fees, dividends, partnership distributions or other distributions.

[*3. The provisions of this Article shall not apply to the income of an athlete in respect of an employment with a team which participates in a league with regularly scheduled games in both Contracting States.*]

The foregoing paragraph was deleted by Article VII of the First Protocol and replaced by the following:

3. The provisions of paragraphs 1 and 2 shall not apply to the income of:

(a) An athlete in respect of his activities as an employee of a team which participates in a league with regularly scheduled games in both Contracting States; or

(b) A team described in subparagraph (a).

Article VII of the First Protocol added the following new paragraph 4:

4. Notwithstanding the provisions of Articles XIV (Independent Personal Services)

and XV (Dependent Personal Services) an amount paid by a resident of a Contracting State to a resident of the other Contracting State as an inducement to sign an agreement relating to the performance of the services of an athlete (other than an amount referred to in paragraph 1 of Article XV (Dependent Personal Services)) may be taxed in the first-mentioned State, but the tax so charged shall not exceed 15 per cent of the gross amount of such payment.

Article XVII

Withholding of Taxes In Respect of [Independent] Personal Services

Retitled by Article VIII of the First Protocol.

1. Deduction and withholding of tax on account of the tax liability for a taxable year on remuneration paid to an individual who is a resident of a Contracting State (including an entertainer or athlete) in respect of the performance of independent personal services in the other Contracting State may be required by that other State, but with respect to the first five thousand dollars ($5,000) in the currency of that other State, paid as remuneration in that taxable year by each payor, such deduction and withholding shall not exceed 10 per cent of the payment.

[2. *Where the competent authority of a Contracting State considers that an amount that would otherwise be deducted or withheld from any amount paid or credited to an individual who is a resident of the other Contracting State in respect of the performance of independent personal services in the first-mentioned State is excessive in relation to the estimated tax liability for the taxable year of that individual in the first-mentioned State, it may determine that a lesser amount will be deducted or withheld.*]

The foregoing paragraph was deleted by Article VIII of the First Protocol and replaced by the following:

2. Where the competent authority of a Contracting State considers that an amount that would otherwise be deducted or withheld from any amount paid or credited to an individual who is a resident of the other Contracting State in respect of the performance of personal services in the first-mentioned State is excessive in relation to the estimated tax liability for the taxable year of that individual in the first-mentioned State, it may determine that a lesser amount will be deducted or withheld.

3. The provisions of this Article shall not affect the liability of a resident of a Contracting State referred to in paragraph 1 or 2 for tax imposed by the other Contracting State.

Article XVIII

Pensions and Annuities

[1. *Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State, but the amount of any pension included in income for the purposes of taxation in that other State shall not exceed the amount that would be included in the first-mentioned State if the recipient were a resident thereof.*]

The foregoing paragraph was deleted by Article IX of the First Protocol and replaced by the following:

1. Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State, but the amount of any such pension that would be excluded from taxable income in the first-mentioned State if the recipient were a resident thereof shall be exempt from taxation in that other State.

2. However:

   (a) Pensions may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of a periodic pension payment, the tax so charged shall not exceed 15 per cent of the gross amount of such payment; and

   [*(b) Annuities may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of an annuity payment, the tax so charged shall not exceed 15 per cent of the portion of such payment that is liable to tax in the first-mentioned State.*]

The foregoing subparagraph was deleted by Article IX of the First Protocol and replaced by the following:

   (b) Annuities may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of an annuity payment, the tax so charged shall not exceed 15 per cent of the portion of such payment that would not be excluded from taxable income in the first-mentioned State if the beneficial owner were a resident thereof.

3. For the purposes of this Convention, the term "pensions" includes any payment under a superannuation, pension or retirement plan, Armed Forces retirement pay, war veterans pensions and allowances and amounts paid under a sickness, accident or desirability plan, but does not include payments under an income-averaging annuity contract or any benefit referred to in paragraph 5.

4. For the purposes of the Convention, the term "annuities" means a stated sum paid periodically at stated times during life or during a specified number of years, under an obligation to make the payments in return for adequate and full consideration (other than services rendered), but does not include a payment that is not a periodic payment or any annuity the cost of which was deductible for the purposes of taxation in the Contracting State in which it was acquired.

[*5. Benefits under the social security legislation in a Contracting State paid to a resident of the other Contracting State or a citizen of the United States shall be taxable only in the first-mentioned State.*]

The foregoing paragraph was deleted by Article 1 of the Second Protocol and replaced by the following:

5. Benefits under the social security legislation in a Contracting State paid to a resident of the other Contracting State shall be taxable as follows:

   (a) Such benefits shall be taxable only in that other State;

   (b) Notwithstanding the provisions of subparagraph (a), one-half of the total amount of any such benefit paid in a taxable year shall be exempt from taxation in that other State.

[*6. Alimony and other similar amounts (including child support payments) arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in that other State, but the amount included in income for the purposes of taxation in that other State shall not exceed the amount that would be included in income in the first-mentioned State if the recipient were a resident thereof.*]

The foregoing paragraph was deleted by Article IX of the First Protocol and replaced by the following:

6. Alimony and other similar amounts (including child support payments) arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable as follows:

   (a) Such amounts shall be taxable only in that other State;

   (b) Notwithstanding the provisions of subparagraph (a), the amount that would be excluded from taxable income in the first-mentioned State if the recipient were a resident thereof shall be exempt from taxation in that other State.

Note: *Paragraphs 3 and 5 are deleted and replaced; a new paragraph 7 is added by Article 9 of the Third Protocol.*

Article XIX

Government Service

Remuneration, other than a pension, paid by a Contracting State or a political subdivision or local authority thereof to a citizen of that State in respect of services rendered in the discharge of functions of a governmental nature shall be taxable only in that State. However, the provisions of Article XIV (Independent Personal Services), XV (Dependent Personal Services) or XVI (Artistes and Athletes), as the case may be, shall apply, and the preceding sentence shall not apply, to remuneration paid in respect of services rendered in connection with a trade or business carried on by a Contracting State or a political subdivision or local authority thereof.

Article XX

Students

Payments which a student, apprentice or business trainee, who is or was immediately before visiting a Contracting State a resident of the other Contracting State, and who is present in the first-mentioned State for the purpose of this full-time education or training, receives for the purpose of his maintenance, education or training shall not be taxed in that State provided that such payments are made to him from outside that State.

Article XXI

Exempt Organizations

1. Subject to the provisions of paragraph 3, income derived by a religious, scientific, literary, educational or charitable organization shall be exempt from tax in a Contracting State if it is resident in the other Contracting State but only to the extent that such income is exempt from tax in that other State.

[*2. Subject to the provisions of paragraph 3, income referred to in Articles X (Dividends) and XI (Interest) derived by a trust, company or other organization constituted and operated exclusively to administer or provide benefits under one or more funds or plans established to provide pension, retirement or other employee benefits shall be exempt from tax in a Contracting State if it is resident in the other Contracting State and its income is generally exempt from tax in that other State.*]

The foregoing paragraph was deleted by Article X of the First Protocol and replaced by the following:

2. Subject to the provisions of paragraph 3, income referred to in Articles X (Dividends) and XI (Interest) derived by:

   (a) A trust, company or other organization which is resident in a Contracting State, generally exempt from tax in a taxable year in that State and constituted and operated exclusively to administer or provide benefits under one or more funds or plans established to provide pension, retirement or other employee benefits; or

   (b) A trust, company or other organization which is resident in a Contracting State, not taxed in a taxable year in that State and constituted and operated exclusively to earn income for the benefit of an organization referred to in subparagraph (a);

   shall be exempt from tax in that taxable year in the other Contracting State.

3. The provisions of paragraphs 1 and 2 shall not apply with respect to the income of a trust, company or other organization from carrying on a trade or business or from a related person other than a person referred to in paragraph 1 or 2.

4. A religious, scientific, literary, educational or charitable organization which is resident in Canada and which has received substantially all of its support from persons other than citizens or residents of the United States shall be exempt in the United States from the United States excise taxes imposed with respect to private foundations.

5. For the purposes of the United States taxation, contributions by a citizen or resident of the United States to an organization which is resident in Canada, which is generally exempt from Canadian tax and which could qualify in the United States to receive deductible contributions if it were resident in the United States shall be treated as charitable contributions; however, such contributions (other than such contributions to a college or university at which the citizen or resident or a member of his family is or was enrolled) shall not be deductible in any taxable year to the extent that they exceed an amount determined by applying the percentage limitations of the laws of the United States in respect of the deductibility of charitable contributions to the income of such citizen or resident arising in Canada. The preceding sentence shall not be interpreted to allow in any taxable year deductions for charitable contributions in excess of the amount allowed under the percentage limitations of the laws of the United States in respect of the deductibility of charitable contributions.

6. For the purposes of Canadian taxation, gifts by a resident of Canada to an organization which is resident in the United States, which is generally exempt from United States tax and which could qualify in Canada to receive deductible gifts if it were created or established and resident in Canada shall be treated as gifts to a registered charity; however, such gifts (other than such gifts to a college or university at which the resident or a member of his family is or was enrolled) shall not be deductible in any taxable year to the extent that they exceed an amount

determined by applying the percentage limitations of the laws of Canada in respect of the deductibility of gifts to registered charities to the income of such resident arising in the United States. The preceding sentence shall not be interpreted to allow in any taxable year deductions for gifts to registered charities in excess of the amount allowed under the percentage limitations of the laws of Canada in respect of the deductibility of gifts to registered charities.

Note: *Paragraphs 2 and 3 are deleted and replaced by subparagraphs 2(a), 2(b) and paragraph 3 of Article 10 of the Third Protocol. Article 10 also adds a new sentence at the end of paragraph 5 and replaces paragraph 6.*

Article XXII

Other Income

1. Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Convention shall be taxable only in that State, except that if such income arises in the other Contracting State it may also be taxed in that other State.
2. To the extent that income distributed by an estate or trust is subject to the provision of paragraph 1, then, notwithstanding such provisions, income distributed by an estate or trust which is a resident of a Contracting State to a resident of the other Contracting State who is a beneficiary of the estate or trust may be taxed in the first-mentioned State and according to the laws of that State, but the tax so charged shall not exceed 15 per cent of the gross amount of the income; provided, however, that such income shall be exempt from tax in the first-mentioned State to the extent of any amount distributed out of income arising outside that State.

Note: *A new paragraph 3 is added to this Article by Article 11 of the Third Protocol.*

Article XXIII

Capital

1. Capital represented by real property, owned by a resident of a Contracting State and situated in the other Contracting State, may be taxed in that other State.
2. Capital represented by personal property forming part of the business property of a permanent establishment which a resident of a Contracting State has in the other Contracting State, or by personal property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, may be taxed in that other State.
3. Capital represented by ships and aircraft operated by a resident of a Contracting State in international traffic, and by personal property pertaining to the operation of such ships and aircraft, shall be taxable only in that State.
4. All other elements of capital of a resident of a Contracting State shall be taxable only in that State.

Article XXIV

Elimination of Double Taxation

[1. *In the case of the United States, subject to the provisions of paragraphs 4, 5 and*

6. double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a citizen or resident of the United States, or to a company electing to be treated as a domestic corporation, as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada; and, in the case of a company which is a resident of the United States owning at least 10 per cent of the voting stock of a company which is a resident of Canada from which it receives dividends in any taxable year, the United States shall allow as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada by that company with respect to the profits out of which such dividends are paid. Such appropriate amount shall be based upon the amount of income tax paid or accrued to Canada, but shall not exceed that proportion of the United States tax that taxable income arising in Canada bears to the entire taxable income.]

The foregoing paragraph was deleted by Article XI of the First Protocol and replaced by the following:

1. In the case of the United States, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a citizen or resident of the United States, or to a company electing to be treated as a domestic corporation, as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada; and, in the case of a company which is a resident of the United States owning at least 10 per cent of the voting stock of a company which is a resident of Canada from which it receives dividends in any taxable year, the United States shall allow as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada by that company with respect to the profits out of which such dividends are paid.

[*2. In the case of Canada, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows:*

(a) Subject to the provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof), and unless a greater deduction or relief is provided under the law of Canada, income tax paid or accrued to the United States on profits, income or gains arising in the United States shall be deducted from any Canadian tax payable in respect of such profits, income or gains; and

(b) Subject to the provisions of the law of Canada regarding the determination of the exempt surplus of a foreign affiliate and to any subsequent modification of those provisions (which shall not affect the general principle hereof), for the purposes of computing Canadian tax, a company which is a resident of Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate which is a resident of the United States.]

The foregoing paragraph was deleted by Article XI of the First Protocol and replaced by the following:

2. In the case of Canada, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows:

(a) Subject to the provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof), and unless a greater deduction or relief is provided under the law of Canada, income tax paid or accrued to the United States on profits, income or gains arising in the United States shall be deducted from any Canadian tax payable in respect of such profits, income or gains;

(b) Subject to the provisions of the law of Canada regarding the determination of the exempt surplus of a foreign affiliate and to any subsequent modification of those provisions (which shall not affect the general principle hereof), for the purposes of computing Canadian tax, a company which is a resident of Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate which is a resident of the United States; and

(c) Notwithstanding the provisions of subparagraph (a), where Canada imposes a tax on gains from the alienation of property that, but for the provisions of paragraph 5 of Article XIII (Gains), would not be taxable in Canada, income tax paid or accrued to the United States on such gains shall be deducted from any Canadian tax payable in respect of such gains.

3. For the purposes of this Article:

(a) Profits, income or gains (other than gains to which paragraph 5 of Article XIII (Gains) applies) of a resident of a Contracting State which may be taxed in the other Contracting State in accordance with the Convention (without regard to paragraph 2 of Article XXIX (Miscellaneous Rules)) shall be deemed to arise in that other State; and

(b) Profits, income or gains of a resident of a Contracting State which may not be taxed in the other Contracting State in accordance with the Convention (without regard to paragraph 2 of Article XXIX (Miscellaneous Rules)) or to which paragraph 5 of Article XIII (Gains) applies shall be deemed to arise in the first-mentioned State.

4. Where a United States citizen is a resident of Canada, the following rules shall apply:

(a) Canada shall allow a deduction from the Canadian tax in respect of income tax paid or accrued to the United States in respect of profits, income or gains which arise (within the meaning of paragraph 3) in the United States, except that such deduction need not exceed the amount of tax that would be paid to the United States if the resident were not a United States citizen; and

(b) For the purposes of computing the United States tax, the United States shall allow as a credit against United States tax the income tax paid or accrued to Canada after the deduction referred to in subparagraph (a). The credit so allowed shall not reduce that portion of the United States tax that is deductible from Canadian tax in accordance with subparagraph (a).

5. Notwithstanding the provisions of paragraph 4, where a United States citizen is a resident of Canada, the following rules shall apply in respect of the items of income referred to in Article X (Dividends), XI (Interest) or XII (Royalties) which arise (within the meaning of paragraph 3) in the United States, as long as the law in force in Canada allows a deduction in computing income for the portion of any foreign tax paid in respect of such items which exceeds 15 per cent of the amount thereof:

(a) The deduction so allowed in Canada shall not be reduced by any credit or

deduction for income tax paid or accrued to Canada allowed in computing the United States tax on such items;

(b) Canada shall allow a deduction from the Canadian tax in respect of the income paid or accrued to the United States on such items, except that such deduction need not exceed 15 per cent of the gross amount of such items that has been included in computing the income of the citizen for Canadian tax purposes; and

(c) For the purposes of computing the United States tax on such items, the United States shall allow as a credit against United States tax the income tax paid or accrued to Canada after the deduction referred to in subparagraph (b). The credit so allowed shall reduce only that portion of the United States tax on such items which exceeds 15 per cent of the amount thereof included in computing United States taxable income.

6. Where a United States citizen is a resident of Canada, items of income referred to in paragraph 4 or 5 shall, notwithstanding the provisions of paragraph 3, be deemed to arise in Canada to the extent necessary to avoid the double taxation of such income under paragraph 4(b) or paragraph 5(c).

7. For the purposes of this Article, any reference to "income tax paid or accrued" to a Contracting State shall include Canadian tax and United States tax, as the case may be, and taxes of general application which are paid or accrued to a political subdivision or local authority of that State, which are not imposed by that political subdivision or local authority in a manner inconsistent with the provisions of the Convention and which are substantially similar to the taxes of that State referred to in paragraphs 2 and 3(a) of Article II (Taxes Covered).

8. Where a resident of a Contracting State owns capital which, in accordance with the provisions of the Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow as a deduction from the tax on the capital of that resident an amount equal to the capital tax paid in that other State. The deduction shall not, however, exceed that part of the capital tax, as computed before the deduction is given, which is attributable to the capital which may be taxed in that other State.

The following paragraph 9 was added to the Article by Article XI of the First Protocol:

9. The provisions of this Article relating to the source of profits, income or gains shall not apply for the purpose of determining a credit against United States tax for any foreign taxes other than income taxes paid or accrued to Canada.

Note: *Subparagraphs 2(a) and 2(b), paragraphs 5 and 7 are deleted and replaced and a new paragraph 10 has been added by Article 12 of the Third Protocol.*

Article XXV

Non-Discrimination

1. Citizens of a Contracting State, who are residents of the other Contracting State, shall not be subjected in that other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of that other State in the same circumstances are or may be subjected.

2. Citizens of a Contracting State, who are not residents of the other Contracting

State, shall not be subjected in that other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of any third State in the same circumstances (including State of residence) are or may be subjected.

3. In determining the taxable income of an individual who is a resident of a Contracting State, there shall be allowed as a deduction in respect of any other person who is a resident of the other Contracting State and who is dependent on the individual for support the amount that would be so allowed if that other person were a resident of the first-mentioned State.

4. Where a married individual who is a resident of Canada and not a citizen of the United States has income that is taxable in the United States pursuant to Article XV (Dependent Personal Services), the United States tax with respect to such income shall not exceed such proportion of the total United States tax that would be payable for the taxable year if both the individual and his spouse were United States citizens as the individual's taxable income determined without regard to this paragraph bears to the amount that would be the total taxable income of the individual and his spouse. For the purpose of this paragraph,

   (a) The "total United States tax" shall be determined as if all the income of the individual and his spouses arose in the United States; and

   (b) A deficit of the spouse shall not be taken into account in determining taxable income.

5. Any company which is a resident of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar companies of the first-mentioned State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of a third State, are or may be subjected.

[*6. Notwithstanding the provisions of Article XXIV (Elimination of Double Taxation), the taxation on a permanent establishment which a resident of a Contracting State has in the other Contracting State shall not be less favorably levied in the other State than the taxation levied on residents of the other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.*]

The foregoing paragraph was deleted by Article XII of the First Protocol and replaced by the following:

6. Notwithstanding the provisions of Article XXIV (Elimination of Double Taxation), the taxation on a permanent establishment which a resident of a Contracting State has in the other Contracting State shall not be less favorably levied in the other State than the taxation levied on residents of the other State carrying on the same activities. This paragraph shall not be construed as obliging a Contracting State:

   (a) To grant to a resident of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents; or

   (b) To grant to a company which is a resident of the other Contracting State the

same tax relief that it provides to a company which is a resident of the first-mentioned State with respect to dividends received by it from a company.

7. Except where the provisions of paragraph 1 of Article IX (Related Persons), paragraph 7 of Article XI (Interest) or paragraph 7 of Article XII (Royalties) apply, interest, royalties and other disbursements paid by a resident of a Contracting State to a resident of the other Contracting State shall, for the purposes of determining the taxable profits of the first-mentioned resident, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of a resident of a Contracting State shall, for the purposes of determining the taxable capital of the first-mentioned resident, be deductible under the same conditions as if they had been contracted to a resident of the first-mentioned States.

8. The provisions of paragraph 7 shall not affect the operation of any provision of the taxation laws of a Contracting State:

   (a) Relating to the deductibility of interest and which is in force on the date of signature of this Convention (including any subsequent modification of such provisions that do not change the general nature thereof); or

   (b) Adopted after such date by a Contracting State and which is designed to ensure that a person who is not a resident of that State does not enjoy, under the laws of that State, a tax treatment that is more favorable than that enjoyed by residents of that State.

[The next page is 17,129]

9. Expenses incurred by a citizen or resident of a Contracting State with respect to any convention (including any seminar, meeting, congress or other function of a similar nature) held in the other Contracting State shall, for the purposes of taxation in the first-mentioned State, be deductible to the same extent that such expenses would be deductible if the convention were held in the first-mentioned State.

10. Notwithstanding the provisions of Article II (Taxes Covered), this Article shall apply:

    (a) In the case of Canada, to all taxes imposed under the *Income Tax Act*; and

    (b) In the case of the United States, to all taxes imposed under the Internal Revenue Code.

Note: *Paragraph 3 is deleted and replaced by paragraph 1 of Article 13 of the Third Protocol. Paragraph 10 is deleted and replaced by paragraph 2 of Article 13 of the Third Protocol.*

Article XXVI

Mutual Agreement Procedure

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case in writing to the competent authority of the Contracting State of which he is a resident or, if he is a resident of neither Contracting State, of which he is a national.

2. The competent authority of the Contracting State to which the case has been presented shall endeavor, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Except where the provisions of Article IX (Related Persons) apply, any agreement reached shall be implemented notwithstanding any time or other procedural limitations in the domestic law of the Contracting States, provided that the competent authority of the other Contracting State has received notification that such a case exists within six years from the end of the taxable year to which the case relates.

3. The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. In particular, the competent authorities of the Contracting States may agree:

    (a) To the same attribution of profits to a resident of a Contracting State and its permanent establishment situated in the other Contracting State;

    (b) To the same allocation of income, deductions, credits or allowances between persons;

    (c) To the same determination of the source, and the same characterization, of particular items of income;

    (d) To a common meaning of any term used in the Convention;

    (e) To the elimination of double taxation with respect to income distributed by an estate or trust;

(f) To the elimination of double taxation with respect to a partnership; or

(g) To increases in any dollar amounts referred to in the Convention to reflect monetary or economic developments.

The may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. Each of the Contracting States will endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not ensure to the benefit of persons not entitled thereto. However, nothing in this paragraph shall be construed as imposing on either of the Contracting States the obligation to carry out administrative measures of a different nature from those used in the collection of its own tax or which would be contrary to its public policy (ordre public).

5. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

Note: *Subparagraphs 3(f) and 3(g) are deleted and replaced by subparagraphs 3(f), 3(g) and 3(h). A new paragraph 6 has been added, all by Article 14 of the Third Protocol.*

Article XXVI A

Assistance in Collection

This is a new Article added by Article 15 of the Third Protocol. It has 11 paragraphs.

Article XXVII

Exchange of Information

1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws in the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article I (Personal Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.

2. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall endeavor to obtain the information to which the request relates in the same way as if its own taxation was involved notwithstanding the fact that the other State does not, at that time, need such information. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall endeavor to provide information

under this Article in the form requested, such as depositions of witnesses and copies of unedited original documents (including books, papers, statements, records, accounts or writings), to the same extent such depositions and documents can be obtained under the laws and administrative practices of that other State with respect to its own taxes.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

   (a) To carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

   (b) To supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or

   (c) To supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4. Notwithstanding the provisions of Article II (Taxes Covered) for the purposes of this Article the Convention shall apply:

   (a) In the case of Canada, to all taxes imposed by the Government of Canada on estates and gifts and under the *Income Tax Act*; and

   (b) In the case of the United States, to all taxes imposed under the Internal Revenue Code.

This article was judicially considered in *Montreal Aluminum Processing Inc. v. Canada*, [1991] 2 CTC 70 (F.C.T.D.); revd 92 DTC 6567 (F.C.A.). The case digest will be found under article 27 in the commentary section of the United States Convention, which appears in Volume III.

Note: *Paragraphs 1 and 4 are deleted and replaced by Article 17 of the Third Protocol.*

Article XXVIII

Diplomatic Agents and Consular Officers

Nothing in this Convention shall affect the fiscal privileges of diplomatic agents or consular officers under the general rules of international law or under the provisions of special agreements.

Article XXIX

Miscellaneous Rules

1. The provisions of this Convention shall not restrict in any manner any exclusion, exemption, deduction, credit, or other allowance now or hereafter accorded by the laws of a Contracting State in the determination of the tax imposed by that State.

[2. *Except as provided in paragraph 3, nothing in the Convention shall be construed as preventing a Contracting State from taxing its residents (as determined under Article IV (Residence)) and, in the case of the United States, its citizens (including a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of income tax, but only for a period of ten years following such loss) and companies electing to be treated as domestic corporations, as if there were no convention between the United States and Canada with respect to taxes on income and on capital.*]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

2. Except as provided in paragraph 3, nothing in the Convention shall be construed as preventing a Contracting State from taxing its residents (as determined under Article IV (Residence)) and, in the case of the United States, its citizens (including a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of ten years following such loss) and companies electing to be treated as domestic corporations, as if there were no convention between the United States and Canada with respect to taxes on income and on capital.

3. The provisions of paragraph 2 shall not affect the obligations undertaken by a Contracting State:

[*(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraph 5 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XVIII (Pensions and Annuities), XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and*]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5 and 6(b) of Article XVIII (Pensions and Annuities), paragraph 5 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and

The foregoing subparagraph, in turn, was deleted by Article II of the Second Protocol and replaced by the following:

(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5(b) and 6(b) of Article XVIII (Pensions and Annuities), paragraphs 5 and 7 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and

(b) Under Article XX (Students), towards individuals who are neither citizens of, nor have immigrant status in, that State.

[*4. With respect to taxable years not barred by the statute of limitations ending on or before December 31 of the year in which the Convention enters into force, income from personal services not subject to tax by the United States under the 1942 Convention shall not be considered wages or net earnings from self-employment for purposes of social security taxes imposed under the Internal Revenue Code.*]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

4. With respect to taxable years not barred by the statute of limitations ending on or before December 31 of the year before the year in which the Social Security Agreement between Canada and the United States (signed in Ottawa on March 11, 1981) enters into force, income from personal services not subject to tax by the United States under this Convention or the 1942 Convention shall not be considered wages or net earnings from self-employment for purposes of social security taxes imposed under the Internal Revenue Code.

[5. *A United States citizen who is a resident of Canada and a beneficiary of a Canadian registered retirement savings plan may elect, under rules established by the competent authority of the United States, to defer United States taxation with respect to any income accrued in the plan but not distributed by the plan, until such time as a distribution is made from such plan, or any plan substituted therefor.*]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

5. A beneficiary of a Canadian registered retirement savings plan may elect, under rules established by the competent authority of the United States, to defer United States taxation with respect to any income accrued in the plan but not distributed by the plan, until such time as a distribution is made from such plan, or any plan substituted therefor. The provisions of the preceding sentence shall not apply to income which is reasonably attributable to contributions made to the plan by the beneficiary while he was not a resident of Canada.

[6. *If 25 per cent or more of the capital of a company which is a resident of a Contracting State is owned directly or indirectly by individuals who are not residents of that State, and if by reason of special measures the tax imposed in that State on that company with respect to dividends (other than dividends referred to in paragraph 2(a) of Article X (Dividends)), interest or royalties arising in the other Contracting State is substantially less than the tax generally imposed by the first-mentioned State on corporate business profits, then, notwithstanding the provisions of Article X (Dividends), XI (Interest) or XII (Royalties), that other State may tax such dividends, interest or royalties as if there were no convention between the United States and Canada with respect to taxes on income and on capital.*]

The foregoing paragraph was deleted by Article XIII of the First Protocol and replaced by the following:

6. Notwithstanding any other provision of the Convention,

   (a) Where profits, income or gains derived by a trust is to be treated for the purposes of the Convention as income of a resident of a Contracting State, and a principal purpose for the establishment, acquisition or maintenance of the trust was to obtain a benefit under the Convention or the 1942 Convention for persons who are not residents of that State, Articles VI (Income from Real Property) through XXIV (Elimination of Double Taxation) shall not apply to profits, income or gains of the trust; and

   (b) Articles VI (Income from Real Property) through XXIV (Elimination of Double Taxation) shall not apply to non-resident-owned investment corporations as defined under section 133 of the *Income Tax Act* of Canada, or under any similar provision enacted by Canada after the date of signature of the Protocol.

7. One-half of the total amount of benefits under the social security legislation in Canada paid in a taxable year to a resident of Canada who is a citizen of the United States shall be exempt from taxation in the United States.

   The foregoing paragraph 7 was added by Article II of the Second Protocol.

Note: *Paragraphs 3(a), 5, 6, and 7 have been deleted and replaced by Article 17 of the Third Protocol.*

Article XXIXA

Limitation on Benefits

This is a new Article added by Article 18 of the Third Protocol.

Article XXIX B

Taxes Imposed by Reason of Death

This is a new Article added by Article 19 of the Third Protocol.

Article XXX

Entry into Force

1. This Convention shall be subjected to ratification in accordance with the applicable procedures of each Contracting State and instruments of ratification shall be exchanged at _____as soon as possible.

2. The Convention shall enter into force upon the exchange of instruments of ratification and, subject to the provisions of paragraph 3, its provisions shall have effect:

   (a) For tax withheld at the source on income referred to in Articles X (Dividends), XI (Interest), XII (Royalties) and XVIII (Pensions and Annuities), with respect to amounts paid or credited on or after the first day of the second month next following the date on which the Convention enters into force;

   (b) For other taxes, with respect to taxable years beginning on or after the first day of January next following the date on which the Convention enters into force; and

   (c) Notwithstanding the provisions of subparagraph (b), for the taxes covered by paragraph 4 of Article XXIX (Miscellaneous Rules) with respect to all taxable years referred to in that paragraph.

[*3. For the purposes of applying the United States foreign tax credit in relation to taxes paid or accrued to Canada:*

   (a) Notwithstanding the provisions of paragraph 2(a) of Article II (Taxes Covered), the tax on 1971 undistributed income on hand imposed by Part IX of the Income Tax Act of Canada shall be considered to be an income tax for distributions made on or after the first day of January 1972 and before the first day of January 1979, and shall be considered imposed upon the recipient of a distribution, in the proportion that the distribution out of undistributed income with respect to which the tax has been paid bears to 85 per cent of such undistributed income; and

   (b) The principles of paragraph 6 of Article XXIV (Elimination of Double Taxation) shall have effect for taxable years beginning on or after the first day of January 1976.

Any claim for refund based on the provisions of this paragraph may be filed on or

before June 30 of the calendar year following that in which the Convention enters into force, notwithstanding any rule of domestic law to the contrary.]

The foregoing paragraph was deleted by Article XIV of the First Protocol and replaced by the following:

3. For the purposes of applying the United States foreign tax credit in relation to taxes paid or accrued to Canada:

   (a) Notwithstanding the provisions of paragraph 2(a) of Article II (Taxes Covered), the tax on 1971 undistributed income on hand imposed by Part IX of the *Income Tax Act* of Canada shall be considered to be an income tax for distributions made on or after the first day of January 1972 and before the first day of January 1979 and shall be considered to be imposed upon the recipient of a distribution, in the proportion that the distribution out of undistributed income with respect to which the tax has been paid bears to 85 per cent of such undistributed income;

   (b) The principles of paragraph 6 of Article XXIV (Elimination of Double Taxation) shall have effect for taxable years beginning on or after the first day of January 1976; and

   (c) The provisions of paragraph 1 of Article XXIV shall have effect for taxable years beginning on or after the first day of January 1981.

   Any claim for refund based on the provisions of this paragraph may be filed on or before June 30 of the calendar year following that in which the Convention enters into force, notwithstanding any rule of domestic law to the contrary.

4. Subject to the provisions of paragraph 5, the 1942 Convention shall cease to have effect for taxes for which this Convention has effect in accordance with the provisions of paragraph 2.

5. Where any greater relief from tax would have been afforded by any provision of the 1942 Convention than under this Convention, any such provision shall continue to have effect for the first taxable year with respect to which the provisions of this Convention have effect under paragraph 2(b).

6. The 1942 Convention shall terminate on the last date on which it has effect in accordance with the preceding provisions of this Article.

7. The Exchange of Notes between the United States and Canada dated August 2 and September 17, 1928, providing for relief from double income taxation on shipping profits, is terminated. Its provisions shall cease to have effect with respect to taxable years beginning on or after the first day of January next following the date on which this Convention enters into force.

8. The provisions of the Convention between the Government of Canada and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on the Estates of Deceased Persons signed at Washington on February 17, 1961 shall continue to have effect with respect to estates of persons deceased prior to the first day of January next following the date on which this Convention enters into force but shall cease to have effect with respect to estates of persons deceased on or after that date. Such Convention shall terminate on the last date on which it has effect in accordance with the preceding sentence.

Note: *Article 20 of the Third Protocol is new, and states that the appropriate authorities of the two Contracting States shall consult within a three-year period from the date*

on which the Protocol enters into force, to discuss further reductions in withholding taxes and also the rules in Article XXIX A and in Article XXVI.

Article 21 of the Third Protocol covers its ratification procedure and when the withholding taxes become effective.

Article XXXI

Termination

1. This Convention shall remain in force until terminated by a Contracting State.

[The next page is 17,135]

2. Either Contracting State may terminate the Convention at any time after 5 years from the date on which the Convention enters into force provided that at least 6 months' prior notice of termination has been given through diplomatic channels.
3. Where a Contracting State considers that a significant change introduced in the taxation laws of the other Contracting State should be accommodated by a modification of the Convention, the Contracting States shall consult together with a view to resolving the matter; if the matter cannot be satisfactorily resolved, the first-mentioned State may terminate the Convention in accordance with the procedures set forth in paragraph 2, but without regard to the 5 year limitation provided therein.
4. In the event the Convention is terminated, the Convention shall cease to have effect:
   (a) For tax withheld at the source on income referred to in Articles X (Dividends), XI (Interest), XII (Royalties), XVIII (Pensions and Annuities) and paragraph 2 of Article XXI (Other Income), with respect to amounts paid or credited on or after the first day of January next following the expiration of the 6 months' period referred to in paragraph 2; and
   (b) For other taxes, with respect to taxable years beginning on or after the first day of January next following the expiration of the 6 months' period referred to in paragraph 2.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE in two copies at Washington this twenty-sixth day of September, 1980, in the French and English languages, each text being equally authentic.

FOR THE GOVERNMENT OF CANADA:
ALLAN J. MacEACHEN

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:
G. WILLIAM MILLER

Excellency:

I have the honor to refer to the Convention between the United States of America and Canada with Respect to Taxes on Income and on Capital, signed today, and to confirm certain understandings reached between the two Governments with respect to the Convention.

1. In French, the term "société" also means a "corporation" within the meaning of Canadian law.
2. The competent authorities of each of the Contracting States shall review the procedures and requirements for an organization of the other Contracting State to establish its status as a religious, scientific, literary, educational or charitable organization entitled to exemption under paragraph 1 of Article XXI (Exempt Organizations), or as an eligible recipient of the charitable contributions or gifts referred to in

paragraphs 5 and 6 of Article XXI, with a view to avoiding duplicate application by such organizations to the administering agencies of both Contracting States. If a Contracting State determines that the other Contracting State maintains procedures to determine such status and rules for qualification that are compatible with such procedures and rules of the first-mentioned Contracting State, it is contemplated that such first-mentioned Contracting State shall accept the certification of the administering agency of the other Contracting State as to such status for the purpose of making the necessary determinations under paragraphs 1, 5 and 6 of Article XXI.

It is further agreed that the term "family," as used in paragraphs 5 and 6 of Article XXI, means an individual's brothers and sisters (whether by whole or half-blood, or by adoption), spouse, ancestors, lineal descendants and adopted descendants.

3. It is the position of Canada that the so-called "unitary apportionment" method used by certain states of the United States to allocate income to United States offices or subsidiaries of Canadian companies results in inequitable taxation and imposes excessive administrative burdens on Canadian companies doing business in those states. Under that method the profit of a Canadian company on its United States business is not determined on the basis of arm's-length relations but is derived from a formula taking account of the income of the Canadian company and its worldwide subsidiaries as well as the assets, payroll and sales of all such companies. For a Canadian multinational company with many subsidiaries in different countries to have to submit its books and records for all of these companies to a state of the United States imposes a costly burden. It is understood that the Senate of the United States has not consented to any limitation on the taxing jurisdiction of the states by a treaty and that a provision which would have restricted the use of unitary apportionment in the case of United Kingdom corporations was recently rejected by the Senate. Canada continues to be concerned about this issue as it affects Canadian multinationals. If an acceptable provision on this subject can be devised, the United States agrees to reopen discussions with Canada on this subject.

[The next page is 17,201]

Schedule II

Protocol Amending the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital Signed at Washington on September 26, 1980

Canada and the United States of America,

Desiring to conclude a Protocol to amend the Convention with respect to Taxes on Income and on Capital signed at Washington on September 26, 1980 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article I

Subparagraph 1(h) of Article III (General Definitions) of the Convention shall be deleted and replaced by the following:

"(h) The term "international traffic" with reference to a resident of a Contracting State means any voyage of a ship or aircraft to transport passengers or property (whether or not operated or used by that resident) except where the principal purpose of the voyage is to transport passengers or property between places within the other Contracting State;"

Article II

Paragraph 4 of Article V (Permanent Establishment) shall be deleted and replaced by the following:

"4. The use of an installation or drilling rig or ship in a Contracting State to explore for or exploit natural resources constitutes a permanent establishment if, but only if, such use is for more than three months in any twelve-month period."

Article III

Article VI (Income from Real Property) shall be deleted and replaced by the following:

"1. Income derived by a resident of a Contracting State from real property (including income from agriculture, forestry or other natural resources) situated in the other Contracting State may be taxed in that other State.

2. For the purposes of this Convention, the term "real property" shall have the meaning which it has under the taxation laws of the Contracting State in which the property in question is situated and shall include any option or similar right in respect thereof. The term shall in any case include usufruct of real property, rights to explore for or to exploit mineral deposits, sources and other natural resources and rights to amounts computed by reference to the amount or value of production from such resources; ships and aircraft shall not be regarded as real property.

3. The provisions of paragraph 1 shall apply to income derived from the direct use, letting or use in any other form of real property and to income from the alienation of such property."

Article IV

Paragraph 1 of Article VIII (Transportation) shall be deleted and replaced by the following:

"1. Notwithstanding the provisions of Articles VII (Business Profits), XII (Royalties) and XIII (Gains), profits derived by a resident of a Contracting State from the operation of ships or aircraft in international traffic, and gains derived by a resident of a Contracting State from the alienation of ships, aircraft or containers (including trailers and related equipment for the transport of containers) used principally in international traffic, shall be exempt from tax in the other Contracting State."

Article V

1. Paragraph 3 of Article XII (Royalties) shall be deleted and replaced by the following:

"3. Notwithstanding the provisions of paragraph 2, copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (but not including royalties in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television) arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State."

2. Paragraph 4 of Article XII (Royalties) shall be deleted and replaced by the following:

"4. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work (including motion pictures and works on film, videotape or other means of reproduction for use in connection with television), any patent, trade mark, design or model, plan, secret formula or process, or for the use of, or the right to use, tangible personal property or for information concerning industrial, commercial or scientific experience, and, notwithstanding the provisions of Article XIII (Gains), includes gains from the alienation of any intangible property or rights described in this paragraph to the extent that such gains are contingent on the productivity, use or subsequent disposition of such property or rights."

3. Subparagraph 6(b) of Article XII (Royalties) shall be deleted and replaced by the following:

"(b) Where the royalties are for the use of, or the right to use, intangible property or tangible personal property in a Contracting State, then such royalties shall be deemed to arise in that State and not in the State of which the payer is a resident."

Article VI

1. Paragraph 3 of Article XIII (Gains) shall be deleted and replaced by the following:

"3. For the purposes of this Article the term "real property situated in the other Contracting State"

(a) In the case of real property situated in the United States, means a United States real property interest and real property referred to in Article VI (Income from Real Property) situated in the United States; and

(b) In the case of real property situated in Canada means:

(i) Real property referred to in Article VI (Income from Real Property) situated in Canada;

(ii) A share of the capital stock of a company, the value of whose shares is derived principally from real property situated in Canada; and

(iii) An interest in a partnership, trust or estate, the value of which is derived principally from real property situated in Canada."

2. Paragraph 5 of Article XIII (Gains) shall be deleted and replaced by the following:

"5. The provisions of paragraph 4 shall not affect the right of a Contracting State to levy tax on gains from the alienation of property derived by an individual who is a resident of the other Contracting State if such individual:

(a) Was a resident of the first-mentioned State for 120 months during any period of 20 consecutive years preceding the alienation of the property; and

(b) Was a resident of the first-mentioned State at any time during the ten years immediately preceding the alienation of the property;

and if such property (or property for which such property was substituted in an alienation the gain on which was not recognized for the purposes of taxation in the first-mentioned State) was owned by the individual at the time he ceased to be a resident of the first-mentioned State."

3. Paragraph 9 of Article XIII (Gains) shall be deleted and replaced by the following:

"9. Where a person who is a resident of a Contracting State alienates a capital asset which may in accordance with this Article be taxed in the other Contracting State and

(a) That person owned the asset on September 26, 1980 and was resident in the first-mentioned State on that date; or

(b) The asset was acquired by that person in an alienation of property which qualified as a non-recognition transaction for the purposes of taxation in that other State;

the amount of the gain which is liable to tax in that other State in accordance with this Article shall be reduced by the proportion of the gain attributable on a monthly basis to the period ending on December 31 of the year in which the Convention enters into force, or such greater portion of the gain as is shown to the satisfaction of the competent authority of the other State to be reasonably attributable to that period. For the purposes of this paragraph the term "non-recognition transaction" includes a transaction to which paragraph 8 applies and, in the case of taxation in the United States, a transaction that would have been a non-recognition transaction but for Sections 897(d) and 897(e) of the Internal Revenue Code. The provisions of this paragraph shall not apply to

(c) An asset that on September 26, 1980 formed part of the business property of a permanent establishment or pertained to a fixed base of a resident of a Contracting State situated in the other Contracting State;

(d) An alienation by a resident of a Contracting State of an asset that was owned at any time after September 26, 1980 and before such alienation by a person who was not at all times after that date while the asset was owned by such person a resident of that State; or

(e) An alienation of an asset that was acquired by a person at any time after September 26, 1980 and before such alienation in a transaction other than a non-recognition transaction."

Article VII

1. Paragraph 3 of Article XVI (Artistes and Athletes) shall be deleted and replaced by the following:

"3. The provisions of paragraphs 1 and 2 shall not apply to the income of:

(a) An athlete in respect of his activities as an employee of a team which participates in a league with regularly scheduled games in both Contracting States; or

(b) A team described in subparagraph (a)."

2. There shall be added to Article XVI (Artistes and Athletes) a new paragraph 4, as follows:

"4. Notwithstanding the provisions of Articles XIV (Independent Personal Services) and XV (Dependent Personal Services) an amount paid by a resident of a Contracting State to a resident of the other Contracting State as an inducement to sign an agreement relating to the performance of the services of an athlete (other than an amount referred to in paragraph 1 of Article XV (Dependent Personal Services)) may be taxed in the first-mentioned State, but the tax so charged shall not exceed 15 per cent of the gross amount of such payment."

Article VIII

1. The Title of Article XVII shall be deleted and replaced by the following:

"Withholding of Taxes in Respect of Personal Services"

2. Paragraph 2 of Article XVII (Withholding of Taxes in Respect of Personal Services) shall be deleted and replaced by the following:

"2. Where the competent authority of a Contracting State considers that an amount that would otherwise be deducted or withheld from any amount paid or credited to an individual who is a resident of the other Contracting State in respect of the performance of personal services in the first-mentioned State is excessive in relation to the estimated tax liability for the taxable year of that individual in the first-mentioned State, it may determine that a lesser amount will be deducted or withheld."

Article IX

1. Paragraph 1 of Article XVIII (Pensions and Annuities) shall be deleted and replaced by the following:

"1. Pensions and annuities arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State, but the amount of any such pension that would be excluded from taxable income in the first-mentioned State if the recipient were a resident thereof shall be exempt from taxation in that other State."

2. Subparagraph 2(b) of Article XVIII (Pensions and Annuities) shall be deleted and replaced by the following:

"(b) Annuities may also be taxed in the Contracting State in which they arise and according to the laws of that State; but if a resident of the other Contracting State is the beneficial owner of an annuity payment, the tax so charged shall not exceed 15 per cent of the portion of such payment that would not be excluded from taxable income in the first-mentioned State if the beneficial owner were a resident thereof."

3. Paragraph 6 of Article XVIII (Pensions and Annuities) shall be deleted and replaced by the following:

"6. Alimony and other similar amounts (including child support payments) arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable as follows:

(a) Such amounts shall be taxable only in that other State;

(b) Notwithstanding the provisions of subparagraph (a), the amount that would be excluded from taxable income in the first-mentioned State if

the recipient were a resident thereof shall be exempt from taxation in that other State."

Article X

Paragraph 2 of Article XXI (Exempt Organizations) shall be deleted and replaced by the following:

"2. Subject to the provisions of paragraph 3, income referred to in Articles X (Dividends) and XI (Interest) derived by:

(a) A trust, company or other organization which is resident in a Contracting State, generally exempt from tax in a taxable year in that State and constituted and operated exclusively to administer or provide benefits under one or more funds or plans established to provide pension, retirement or other employee benefits; or

(b) A trust, company or other organization which is resident in a Contracting State, not taxed in a taxable year in that State and constituted and operated exclusively to earn income for the benefit of an organization referred to in subparagraph (a);

shall be exempt from tax in that taxable year in the other Contracting State."

Article XI

1. Paragraph 1 of Article XXIV (Elimination of Double Taxation) shall be deleted and replaced by the following:

"1. In the case of the United States, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows: In accordance with the provisions and subject to the limitations of the law of the United States (as it may be amended from time to time without changing the general principle hereof), the United States shall allow to a citizen or resident of the United States, or to a company electing to be treated as a domestic corporation, as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada; and, in the case of a company which is a resident of the United States owning at least 10 per cent of the voting stock of a company which is a resident of Canada from which it receives dividends in any taxable year, the United States shall allow as a credit against the United States tax on income the appropriate amount of income tax paid or accrued to Canada by that company with respect to the profits out of which such dividends are paid."

2. Paragraph 2 of Article XXIV (Elimination of Double Taxation) shall be deleted and replaced by the following:

"2. In the case of Canada, subject to the provisions of paragraphs 4, 5 and 6, double taxation shall be avoided as follows:

(a) Subject to the provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof), and unless a greater deduction or relief is provided under the law of Canada, income tax paid or accrued to the United States on profits, income or gains arising in the United States shall be deducted from any Canadian tax payable in respect of such profits, income or gains;

(b) Subject to the provisions of the law of Canada regarding the determination of the exempt surplus of a foreign affiliate and to any subse-

quent modification of those provisions (which shall not affect the general principle hereof), for the purposes of computing Canadian tax, a company which is a resident of Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate which is a resident of the United States; and

(c) Notwithstanding the provisions of subparagraph (a), where Canada imposes a tax on gains from the alienation of property that, but for the provisions of paragraph 5 of Article XIII (Gains), would not be taxable in Canada, income tax paid or accrued to the United States on such gains shall be deducted from any Canadian tax payable in respect of such gains."

3. There shall be added to Article XXIV (Elimination of Double Taxation) a new paragraph 9, as follows:

"9. The provisions of this Article relating to the source of profits, income or gains shall not apply for the purpose of determining a credit against United States tax for any foreign taxes other than income taxes paid or accrued to Canada."

Article XII

Paragraph 6 of Article XXV (Non-Discrimination) shall be deleted and replaced by the following:

"6. Notwithstanding the provisions of Article XXIV (Elimination of Double Taxation), the taxation on a permanent establishment which a resident of a Contracting State has in the other Contracting State shall not be less favorably levied in the other State than the taxation levied on residents of the other State carrying on the same activities. This paragraph shall not be construed as obliging a Contracting State:

(a) To grant to a resident of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents; or

(b) To grant to a company which is a resident of the other Contracting State the same tax relief that it provides to a company which is a resident of the first-mentioned State with respect to dividends received by it from a company."

Article XIII

1. Paragraph 2 of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

"2. Except as provided in paragraph 3, nothing in the Convention shall be construed as preventing a Contracting State from taxing its residents (as determined under Article IV (Residence)) and, in the case of the United States, its citizens (including a former citizen whose loss of citizenship had as one of its principal purposes the avoidance of tax, but only for a period of ten years following such loss) and companies electing to be treated as domestic corporations, as if there were no convention between the United States and Canada with respect to taxes on income and on capital."

2. Subparagraph 3(a) of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

"(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5 and 6(b) of Article XVIII (Pensions and Annuities), paragraph 5 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and"

3. Paragraph 4 of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

"4. With respect to taxable years not barred by the statute of limitations ending on or before December 31 of the year before the year in which the Social Security Agreement between Canada and the United States (signed in Ottawa on March 11, 1981) enters into force, income from personal services not subject to tax by the United States under this Convention or the 1942 Convention shall not be considered wages or net earnings from self-employment for purposes of social security taxes imposed under the Internal Revenue Code."

4. Paragraph 5 of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

"5. A beneficiary of a Canadian registered retirement savings plan may elect, under rules established by the competent authority of the United States, to defer United States taxation with respect to any income accrued in the plan but not distributed by the plan, until such time as a distribution is made from such plan, or any plan substituted therefor. The provisions of the preceding sentence shall not apply to income which is reasonably attributable to contributions made to the plan by the beneficiary while he was not a resident of Canada."

5. Paragraph 6 of Article XXIX (Miscellaneous Rules) shall be deleted and replaced by the following:

"6. Notwithstanding any other provision of the Convention,

(a) Where profits, income or gains derived by a trust is to be treated for the purposes of the Convention as income of a resident of a Contracting State, and a principal purpose for the establishment, acquisition or maintenance of the trust was to obtain a benefit under the Convention or the 1942 Convention for persons who are not residents of that State, Articles VI (Income from Real Property) through XXIV (Elimination of Double Taxation) shall not apply in relation to the profits, income or gains of the trust; and

(b) Articles VI (Income from Real Property) through XXIV (Elimination of Double Taxation) shall not apply to non-resident-owned investment corporations as defined under section 133 of the Income Tax Act of Canada, or under any similar provision enacted by Canada after the date of signature of the Protocol."

Article XIV

Paragraph 3 of Article XXX (Entry into Force) shall be deleted and replaced by the following:

"3. For the purposes of applying the United States foreign tax credit in relation to taxes paid or accrued to Canada:

(a) Notwithstanding the provisions of paragraph 2(a) of Article II (Taxes Covered), the tax on 1971 undistributed income on hand imposed by Part IX of the Income Tax Act of Canada shall be considered to be an income tax for distributions made on or after the first day of January

1972 and before the first day of January 1979 and shall be considered to be imposed upon the recipient of a distribution, in the proportion that the distribution out of undistributed income with respect to which the tax has been paid bears to 85 per cent of such undistributed income;

(b) The principles of paragraph 6 of Article XXIV (Elimination of Double Taxation) shall have effect for taxable years beginning on or after the first day of January 1976; and

(c) The provisions of paragraph 1 of Article XXIV shall have effect for taxable years beginning on or after the first day of January 1981.

Any claim for refund based on the provisions of this paragraph may be filed on or before June 30 of the calendar year following that in which the Convention enters into force, notwithstanding any rule of domestic law to the contrary."

Article XV

1. This protocol shall be subject to ratification in accordance with the applicable procedures of Canada and the United States and instruments of ratification shall be exchanged at Washington as soon as possible.

2. The Protocol shall enter into force upon the exchange of instruments of ratification and shall have effect in accordance with Article XXX (Entry into Force) of the Convention.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

Done in two copies at Ottawa this 14th day of June, 1983, in the English and French languages, each text being equally authentic.

FOR THE GOVERNMENT OF CANADA:
MARC LALONDE

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:
PAUL ROBINSON

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Schedule III

SECOND PROTOCOL

Amending the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital Signed at Washington on September 26, 1980, as Amended by the Protocol Signed at Ottawa on June 14, 1983

Canada and the United States of America, desiring to conclude a second Protocol to amend the Convention with respect to Taxes on Income and on Capital signed at Washington on September 26, 1980, as amended by the Protocol signed at Ottawa on June 14, 1983 (hereinafter referred to as "the Convention"),

Have agreed as follows:

Article I

Paragraph 5 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

"5. Benefits under the social security legislation in a Contracting State paid to a resident of the other Contracting State shall be taxable as follows:

(a) Such benefits shall be taxable only in that other State;

(b) Notwithstanding the provisions of subparagraph (a), one-half of the total amount of any such benefit paid in a taxable year shall be exempt from taxation in that other State."

Article II

1. Subparagraph 3(a) of Article XXIX (Miscellaneous Rules) of the Convention shall be deleted and replaced by the following:

"(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5(b) and 6(b) of Article XVIII (Pensions and Annuities), paragraphs 5 and 7 of Article XXIX (Miscellaneous Rules), paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure); and"

2. There shall be added to Article XXIX (Miscellaneous Rules) of the Convention a new paragraph 7, as follows:

"7. One-half of the total amount of benefits under the social security legislation in Canada paid in a taxable year to a resident of Canada who is a citizen of the United States shall be exempt from taxation in the United States."

Article III

1. This Protocol shall be subject to ratification in accordance with the applicable procedures of Canada and the United States and instruments of ratification shall be exchanged as soon as possible.

2. The Protocol shall enter into force upon the exchange of instruments of ratification and shall have effect in accordance with the provisions of Article XXX (Entry into Force) of the Convention.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

Done in two copies at Washington this 28th day of March, 1984 in the English and French languages, each text being equally authentic.

FOR THE GOVERNMENT OF CANADA:
ALLAN E. GOTLIEB

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:
KENNETH W. DAM

UNITED STATES PROTOCOL

THIRD PROTOCOL

In News Release 94-076, dated August 31, 1994, Finance Minister Paul Martin announced that a third Protocol amending the Convention between Canada and the United States of America with respect to taxes on income and on capital signed on September 26, 1980, as amended by the Protocols signed on June 14, 1983 and March 28, 1984, was signed today at Washington.

Mr. Martin indicated that the reduction of the rate of withholding tax on interest, direct dividends and certain royalties to 10 percent, 5 percent and 0 percent respectively bring these rates into line with those provided in the OECD Model Tax Convention and accepted by a majority of the 25 Member countries of that organization. These reduced rates will facilitate trade and investment between Canada and the United States. The Minister emphasized that the elimination of the tax on royalties for patent and technological information and computer software payments will have the important effect of reducing the cost to Canadian companies of imported technology and know-how from the United States.

The Minister indicated that a significant benefit is provided under the Protocol for Canadians who die owning U.S. real estate or other U.S. property. Under the existing U.S. law, as enacted in 1988, Canadians with U.S. property having a value of more than $60,000 U.S. may be subject to U.S. estate taxes. Under the Protocol, Canadian residents will generally be entitled to treatment that is not less favourable than that available to U.S. citizens. As a result, Canadians will not be subject to U.S. estate tax unless the value of the individual's worldwide gross estate exceeds $600,000 U.S. In addition, a special marital credit will be available with respect to property transferred to the spouse of the deceased. Moreover, Canada has agreed to provide a credit against its tax arising in the year of death on U.S. source income for any U.S. estate tax payable. These provisions will be effective retroactively for deaths occurring after November 10, 1988 — the date on which the major changes to the U.S. estate tax affecting Canadian residents were introduced.

The Minister also noted that another change will affect the taxation of social security benefits paid to non-residents. Under the existing Convention, payments under the social security legislation of one country are not taxable in the other country. Under the Protocol, social security benefits paid from one country will be taxable exclusively in that country and will no longer be subject to tax in the other country. This means that persons who have retired in the United States will no longer be subject to U.S. tax on their Old Age Security benefits or payments under the Canada or Quebec Pension Plan. The Minister announced his intention of proposing amendments to the *Income Tax Act* to extend the 25 percent non-resident withholding tax to such payments effective January 1, 1995. He noted also that the existing provisions of that Act will allow a reduction of such taxes for those persons with relatively modest amounts of Canadian source taxable income. Detailed information relating to persons that may qualify for this reduction and how to make application for it will be provided to all non-residents in receipt of OAS and CPP/QPP benefits.

The Minister also indicated that it was the Government's intention to introduce the required legislation in Parliament in the fall to implement the Protocol, and hoped to have its provisions become effective as of January 1, 1995. Mr. Martin's hope for a Happy New Year's Day was dashed. As can be seen from the text of his December 8 announcement (text reproduced on page 17,231) there will be a one-year's delay.

As it happens, Mr. Martin announced on March 17, 1995, that a revised Third Protocol was signed in Washington that day. The full text of the News Release (95-026) follows.

TECHNICAL REVISION OF THE PROTOCOL SIGNED ON AUGUST 31, 1994, AMEDNING THE CANADA-UNITED STATES INCOME TAX TREATY

Finance Minister Paul Martin today announced that a revised Protocol amending the Convention between Canada and the United States with respect to taxes on income and on capital signed on September 26, 1980, as amended by the Protocols signed on June 14, 1983 and March 28, 1984, was signed today at Washington.

The revised Protocol is identical to that signed by the two countries on August 31, 1994, with the exception of a limited number of technical changes made to clarify the application of the rules dealing with taxes arising on death, and to change the date of application of some of the provisions of the Protocol to reflect the fact that the Protocol signed last year was not ratified in 1994 as had been expected. The full text of the revised Protocol signed today is attached; the provisions which differ from the Protocol signed in August 1994 are indicated by a line in the margin.

The Minister expressed his desire to introduce the legislation required to implement the new Protocol during the current session of Parliament. He also noted that, as a result of the Protocol signed today, both Canada and the United States will not pursue the implementation of the Protocol as signed on August 31, 1994.

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UNITED STATES PROTOCOL

Protocol Signed March 17, 1995, amending the Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital Signed on June 14, 1983 and March 28, 1984

Canada and the United States of America, desiring to conclude a Protocol to amend the Convention with Respect to Taxes on Income and on Capital signed at Washington on September 26, 1980, as amended by the Protocols signed on June 14, 1983, March 28, 1984 and March 17, 1995 (hereinafter referred to as "the Convention "), have agreed as follows:

Article 1

1. Paragraphs 2 to 4 of Article II (Taxes Covered) of the Convention shall be deleted and replaced by the following:

"2. Notwithstanding paragraph 1, the taxes existing on March 17, 1995 to which the Convention shall apply are:

(a) In the case of Canada, the taxes imposed by the Government of Canada under the *Income Tax Act*; and

(b) In the case of the United States, the Federal income taxes imposed by the Internal Revenue Code of 1986. However, the Convention shall apply to:

(i) The United States accumulated earnings tax and personal holding company tax, to the extent, and only to the extent, necessary to implement the provisions of paragraphs 5 and 8 of Article X (Dividends);

(ii) The United States excise taxes imposed with respect to private foundations, to the extent, and only to the extent, necessary to implement the provisions of paragraph 4 of Article XXI (Exempt Organizations);

(iii) The United States social security taxes, to the extent, and only to the extent, necessary to implement the provisions of paragraph 2 of Article XXIV (Elimination of Double Taxation) and paragraph 4 of Article XXIX (Miscellaneous Rules); and

(iv) The United States estate taxes imposed by the Internal Revenue Code of 1986, to the extent, and only to the extent, necessary to implement the provisions of paragraph 3(g) of Article XXVI (Mutual Agreement Procedure) and Article XXIX B (Taxes Imposed by Reason of Death).

3. The Convention shall apply also to:

(a) Any taxes identical or substantially similar to those taxes to which the Convention applies under paragraph 2; and

(b) Taxes on capital;

which are imposed after March 17, 1995 in addition to, or in place of, the taxes to which the Convention applies under paragraph 2."

Article 2

Subparagraphs (c) and (d) of paragraph 1 of Article III (General Definitions) of the Convention shall be deleted and replaced by the following:

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"(c) The term "Canadian tax" means the taxes referred to in Article II (Taxes Covered) that are imposed on income by Canada;

(d) The term "United States tax" means the taxes referred to in Article II (Taxes Covered), other than in subparagraph (b)(i) to (iv) of paragraph 2 thereof, that are imposed on income by the United States;"

Article 3

1. Paragraph 1 of Article IV (Residence) of the Convention shall be deleted and replaced by the following:

"1. For the purposes of this Convention, the term "resident" of a Contracting State means any person that, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, citizenship, place of management, place of incorporation or any other criterion of a similar nature, but in the case of an estate or trust, only to the extent that income derived by the estate or trust is liable to tax in that State, either in its hands or in the hands of its beneficiaries. For the purposes of this paragraph, an individual who is not a resident of Canada under this paragraph and who is a United States citizen or an alien admitted to the United States for permanent residence (a "green card" holder) is a resident of the United States only if the individual has a substantial presence, permanent home or habitual abode in the United States, and that individual's personal and economic relations are closer to the United States than to any third State. The term "resident" of a Contracting State is understood to include:

(a) The Government of that State or a political subdivision or local authority thereof or any agency or instrumentality of any such government, subdivision or authority, and

(b) (i) A trust, organization or other arrangement that is operated exclusively to administer or provide pension, retirement or employee benefits; and

(ii) A not-for-profit organization

that was constituted in that State and that is, by reason of its nature as such, generally exempt from income taxation in that State."

2. A new sentence shall be added at the end of paragraph 3 of Article IV (Residence) of the Convention as follows:

"Notwithstanding the preceding sentence, a company that was created in a Contracting State, that is a resident of both Contracting States and that is continued at any time in the other Contracting State in accordance with the corporate law in that other State shall be deemed while it is so continued to be a resident of that other State."

Article 4

Paragraphs 3 and 4 of the Article IX (Related Persons) of the Convention shall be deleted and replaced by the following:

"3. Where an adjustment is made or to be made by a Contracting State in accordance with paragraph 1, the other Contracting State shall (notwithstanding any time or procedural limitations in the domestic law of that other State) make a corresponding adjustment to the income, loss or tax of the related person in that other State if:

(a) It agrees with the first-mentioned adjustment; and

(b) Within six years from the end of the taxable year to which the first-mentioned adjustment relates, the competent authority of the other State has been notified of the first-mentioned adjustment. The competent authorities, however, may agree to consider cases where the corresponding adjustment would not otherwise be barred by any time or procedural limitations in the other State, even if the notification is not made within the six-year period.

4. In the event that the notification referred to in paragraph 3 is not given within the time period referred to therein, and the competent authorities have not agreed to otherwise consider the case in accordance with paragraph 3(b), the competent authority of the Contracting State which has made or is to make the first-mentioned adjustment may provide relief from double taxation where appropriate."

Article 5

1. The references in paragraphs 2(a) and 6 of Article X (Dividends) of the Convention to a rate of tax of "10 per cent" shall be deleted and replaced by references to a rate of tax of "5 per cent".

2. Paragraph 7 of Article X (Dividends) of the Convention shall be deleted and replaced by the following:

"7. Notwithstanding the provisions of paragraph 2,

(a) Dividends paid by a company that is a resident of Canada and a non-resident-owned investment corporation to a company that is a resident of the United States, that owns at least 10 per cent of the voting stock of the company paying the dividends and that is the beneficial owner of such dividends, may be taxed in Canada at a rate not exceeding 10 per cent of the gross amount of the dividends;

(b) Paragraph 2(b) and not paragraph 2(a) shall apply in the case of dividends paid by a resident of the United States that is a Regulated Investment Company; and

(c) Paragraph 2(a) shall not apply to dividends paid by a resident of the United States that is a Real Estate Investment Trust, and paragraph 2(b) shall apply only where such dividends are beneficially owned by an individual holding an interest of less than 10 per cent in the trust; otherwise the rate of tax applicable under the domestic law of the United States shall apply. Where an estate or a testamentary trust acquired its interest in a Real Estate Investment Trust as a consequence of an individual's death, for the purposes of the preceding sentence the estate or trust shall for the five-year period following the death be deemed with respect to that interest to be an individual."

Article 6

1. The reference in paragraph 2 of Article XI (Interest) of the Convention to "15 per cent" shall be deleted and replaced by a reference to "10 per cent".

2. Paragraph 3(d) of Article XI (Interest) of the Convention shall be deleted and replaced by the following:

"(d) The interest is beneficially owned by a resident of the other Contracting State and is paid with respect to indebtedness arising as a consequence of the sale on credit by a resident of that other State of any equipment, merchandise or services except where the sale or indebtedness was between related persons; or"

3. A new paragraph 9 shall be added to Article XI (Interest) of the Convention as follows:

"9. The provisions of paragraphs 2 and 3 shall not apply to an excess inclusion with respect to a residual interest in a Real Estate Mortgage Investment Conduit to which Section 860G of the United States Internal Revenue Code, as it may be amended from time to time without changing the general principle thereof, applies."

Article 7

1. Paragraph 3 of Article XII (Royalties) of the Convention shall be deleted and replaced by the following:

"3. Notwithstanding the provisions of paragraph 2,

(a) Copyright royalties and other like payments in respect of the production or reproduction of any literary, dramatic, musical or artistic work (other than payments in respect of motion pictures and works on film, videotape or other means of reproduction for use in connection with television);

(b) Payments for the use of, or the right to use, computer software;

(c) Payments for the use of, or the right to use, any patent or any information concerning industrial, commercial or scientific experience (but not including any such information provided in connection with a rental or franchise agreement); and

(d) Payments with respect to broadcasting as may be agreed for the purposes of this paragraph in an exchange of notes between the Contracting States;

arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State."

2. Paragraph 6 of Article XII (Royalties) of the Convention shall be deleted and replaced by the following:

"6. For the purposes of this Article,

(a) Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State. Where, however, the person paying the royalties, whether he is a resident of a Contracting State or not, has in a State a permanent establishment or a fixed base in connection with which the obligation to pay the royalties was incurred, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated and not in any other State of which the payer is a resident; and

(b) Where subparagraph (a) does not operate to treat royalties as arising in either Contracting State and the royalties are for the use of, or the right to use, intangible property or tangible property in a Contracting State, then such royalties shall be deemed to arise in that State."

Article 8

Paragraph 8 of Article XIII (Gains) of the Convention shall be deleted and replaced by the following:

"8. Where a resident of a Contracting State alienates property in the course of a corporate or other organization, reorganization, amalgamation, division or similar transaction and profit, gain or income with respect to such alienation is not recognized for the purpose of taxation in that State, if requested to do so by the person who acquires the property, the competent authority of the other Contracting State may agree, in order to avoid double taxation and subject to terms and conditions satisfactory to such competent authority, to defer the recognition of the profit, gain or income with respect to such property for the purpose of taxation in that other State until such time and in such manner as may be stipulated in the agreement."

Article 9

1. Paragraph 3 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

"3. For the purposes of this Convention, the term "pensions" includes any payment under a superannuation, pension or other retirement arrangement, Armed Forces retirement pay, war veterans pensions and allowances and amounts paid under a sickness, accident or disability plan, but does not include payments under an income-averaging annuity contract or any benefit referred to in paragraph 5."

2. Paragraph 5 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

"5. Benefits under the social security legislation in a Contracting State (including tier 1 railroad benefits but not including unemployment benefits) paid to a resident of the other Contracting State (and in the case of Canadian benefits, to a citizen of the United States) shall be taxable only in the first-mentioned State."

3. A new paragraph 7 shall be added to Article XVIII (Pensions and Annuities) of the Convention as follows:

"7. A natural person who is a citizen or resident of a Contracting State and a beneficiary of a trust, company, organization or other arrangement that is a resident of the other Contracting State, generally exempt from income taxation in that other State and operated exclusively to provide pension, retirement or employee benefits may elect to defer taxation in the first-mentioned State, under rules established by the competent authority of that State, with respect to any income accrued in the plan but not distributed by the plan, until such time as and to the extent that a distribution is made from the plan or any plan substituted therefor."

Article 10

1. Paragraphs 2 and 3 of Article XXI (Exempt Organizations) of the Convention shall be deleted and replaced by the following:

"2. Subject to the provisions of paragraph 3, income referred to in Articles X (Dividends) and XI (Interest) derived by:

(a) A trust, company, organization or other arrangement that is a resident of a Contracting State, generally exempt from income taxation in a taxable year in that State and operated exclusively to administer or provide pension, retirement or employee benefits; or

(b) A trust, company, organization or other arrangement that is a resident of a Contracting State, generally exempt from income taxation in a taxable year in that State and operated exclusively to earn income for the benefit of an organization referred to in subparagraph (a);

shall be exempt from income taxation in that taxable year in the other Contracting State.

3. The provisions of paragraphs 1 and 2 shall not apply with respect to the income of a trust, company, organization or other arrangement from carrying on a trade or business or from a related person other than a person referred to in paragraph 1 or 2."

2. A new sentence shall be added at the end of paragraph 5 of Article XXI (Exempt Organizations) of the Convention as follows:

"For the purposes of this paragraph, a company that is a resident of Canada and that is taxable in the United States as if it were a resident of the United States shall be deemed to be a resident of the United States."

3. Paragraph 6 of Article XXI (Exempt Organizations) of the Convention shall be deleted and replaced by the following:

"6. For the purposes of Canadian taxation, gifts by a resident of Canada to an organization that is a resident of the United States, that is generally exempt from United States tax and that could qualify in Canada as a registered charity if it were a resident of Canada and created or established in Canada, shall be treated as gifts to a registered charity; however, no relief from taxation shall be available in any taxation year with respect to such gifts (other than such gifts to a college or university at which the resident or a member of the resident's family is or was enrolled) to the extent that such relief would exceed the amount of relief that would be available under the Income Tax Act if the only income of the resident for that year were the resident's income arising in the United States. The preceding sentence shall not be interpreted to allow in any taxation year relief from taxation for gifts to registered charities in excess of the amount of relief allowed under the percentage limitations of the laws of Canada in respect of relief for gifts to registered charities."

Article 11

A new paragraph 3 shall be added to Article XXII (Other Income) of the Convention as follows:

"3. Losses incurred by a resident of a Contracting State with respect to wagering transactions the gains on which may be taxed in the other Contracting State shall, for the purpose of taxation in that other State, be deductible to the same extent that such losses would be deductible if they were incurred by a resident of that other State."

Article 12

1. Paragraphs 2(a) and 2(b) of Article XXIV (Elimination of Double Taxation) of the Convention shall be deleted and replaced by the following:

"(a) Subject to the provisions of the law of Canada regarding the deduction from tax payable in Canada of tax paid in a territory outside Canada and to any subsequent modification of those provisions (which shall not affect the general principle hereof)

(i) Income tax paid or accrued to the United States on profits, income or gains arising in the United States, and

(ii) In the case of an individual, any social security taxes paid to the United States (other than taxes relating to unemployment insurance benefits) by the individual on such profits, income or gains

shall be deducted from any Canadian tax payable in respect of such profits, income or gains;

(b) Subject to the existing provisions of the law of Canada regarding the taxation of income from a foreign affiliate and to any subsequent modification of those provisions — which shall not affect the general principle hereof — for the purpose of computing Canadian tax, a company which is a resident of Canada shall be allowed to deduct in computing its taxable income any dividend received by it out of the exempt surplus of a foreign affiliate which is a resident of the United States; and"

2. Paragraph 5 of Article XXIV (Elimination of Double Taxation) of the Convention shall be deleted and replaced by the following:

"5. Notwithstanding the provisions of paragraph 4, where a United States citizen is a resident of Canada, the following rules shall apply in respect of the items of income referred to in Article X (Dividends), XI (Interest) or XII (Royalties) that arise (within the meaning of paragraph 3) in the United States and that would be subject to United States tax if the resident of Canada were not a citizen of the United States, as long as the law in force in Canada allows a deduction in computing income for the portion of any foreign tax paid in respect of such items which exceeds 15 per cent of the amount thereof:

(a) The deduction so allowed in Canada shall not be reduced by any credit or deduction for income tax paid or accrued to Canada allowed in computing the United States tax on such items;

(b) Canada shall allow a deduction from Canadian tax on such items in respect of income tax paid or accrued to the United States on such items, except that such deduction need not exceed the amount of the tax that would be paid on such items to the United States if the resident of Canada were not a United States citizen; and

(c) For the purposes of computing the United States tax on such items, the United States shall allow as a credit against United States tax the income tax paid or accrued to Canada after the deduction referred to in subparagraph (b). The credit so allowed shall reduce only that portion of the United States tax on such items which exceeds the amount of tax that would be paid to the United States on such items if the resident of Canada were not a United States citizen."

3. Paragraph 7 of Article XXIV (Elimination of Double Taxation) of the Convention shall be deleted and replaced by the following:

"7. For the purposes of this Article, any reference to "income tax paid or accrued" to a Contracting State shall include Canadian tax and United States tax, as the case may be, and taxes of general application which are paid or accrued to a political subdivision or local authority of that State, which are not imposed by that political subdivision or local authority in a manner inconsistent with the provisions of the Convention and which are substantially similar to the Canadian tax or United States tax, as the case may be."

4. A new paragraph 10 shall be added to Article XXIV (Elimination of Double Taxation) of the Convention as follows:

"10. Where in accordance with any provision of the Convention income derived or capital owned by a resident of a Contracting State is exempt from tax in that State, such State may nevertheless, in calculating the amount of tax on other income or capital, take into account the exempted income or capital."

Article 13

1. Paragraph 3 of Article XXV (Non-Discrimination) of the Convention shall be deleted and replaced by the following:

"3. In determining the taxable income or tax payable of an individual who is a resident of a Contracting State, there shall be allowed as a deduction in respect of any other person who is a resident of the other Contracting State and who is dependent on the individual for support the amount that would be so allowed if that other person were a resident of the first-mentioned State."

2. Paragraph 10 of Article XXV (Non-Discrimination) of the Convention shall be deleted and replaced by the following.

"10. Notwithstanding the provisions of Article II (Taxes Covered), this Article shall apply to all taxes imposed by a Contracting State."

Article 14

1. Paragraphs 3(f) and (g) of Article XXVI (Mutual Agreement Procedure) of the Convention shall be deleted and replaced by the following:

"(f) To the elimination of double taxation with respect to a partnership;

(g) To provide relief from double taxation resulting from the application of the estate tax imposed by the United States or the Canadian tax as a result of a distribution or disposition of property by a trust that is a qualified domestic trust within the meaning of section 2056A of the Internal Revenue Code, or is described in subsection 70(6) of the Income Tax Act or is treated as such under paragraph 5 of Article XXIX B (Taxes Imposed by Reason of Death), in cases where no relief is otherwise available; or

(h) To increases in any dollar amounts referred to in the Convention to reflect monetary or economic developments."

2. A new paragraph 6 shall be added to Article XXVI (Mutual Agreement Procedure) of the Convention as follows:

"6. If any difficulty or doubt arising as to the interpretation or application of the Convention cannot be resolved by the competent authorities pursuant to the preceding paragraphs of this Article, the case may, if both competent author-

ities and the taxpayer agree, be submitted for arbitration, provided that the taxpayer agrees in writing to be bound by the decision of the arbitration board. The decision of the arbitration board in a particular case shall be binding on both States with respect to that case. The procedures shall be established in an exchange of notes between the Contracting States. The provisions of this paragraph shall have effect after the Contracting States have so agreed through the exchange of notes."

Article 15

A new Article XXVI A (Assistance in Collection) shall be added to the Convention as follows:

"Article XXVI A

Assistance in Collection

1. The Contracting States undertake to lend assistance to each other in the collection of taxes referred to in paragraph 9, together with interest, costs, additions to such taxes and civil penalties, referred to in this Article as a "revenue claim".

2. An application for assistance in the collection of a revenue claim shall include a certification by the competent authority of the applicant State that, under the laws of that State, the revenue claim has been finally determined. For the purposes of this Article, a revenue claim is finally determined when the applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted.

3. A revenue claim of the applicant State that has been finally determined may be accepted for collection by the competent authority of the requested State and, subject to the provisions of paragraph 7, if accepted shall be collected by the requested State as though such revenue claim were the requested State's own revenue claim finally determined in accordance with the laws applicable to the collection of the requested State's own taxes.

4. Where an application for collection of a revenue claim in respect of a taxpayer is accepted

   (a) By the United States, the revenue claim shall be treated by the United States as an assessment under United States laws against the taxpayer as of the time the application is received; and

   (b) By Canada, the revenue claim shall be treated by Canada as an amount payable under the *Income Tax Act*, the collection of which is not subject to any restriction.

5. Nothing in this Article shall be construed as creating or providing any rights of administrative or judicial review of the applicant State's finally determined revenue claim by the requested State, based on any such rights that may be available under the laws of either Contracting State. If, at any time pending execution of a request for assistance under this Article, the applicant State loses the right under its internal law to collect the revenue claim, the competent authority of the applicant State shall promptly withdraw the request for assistance in collection.

6. Subject to this paragraph, amounts collected by the requested State pursuant to this Article shall be forwarded to the competent authority of the applicant State. Unless the competent authorities of the Contracting States otherwise agree, the ordinary costs incurred in providing collection assistance shall be borne by the requested State and any extraordinary costs so incurred shall be borne by the applicant State.

7. A revenue claim of an applicant State accepted for collection shall not have in the requested State any priority accorded to the revenue claims of the requested State.

8. No assistance shall be provided under this Article for a revenue claim in respect of a taxpayer to the extent that the taxpayer can demonstrate that

   (a) Where the taxpayer is an individual, the revenue claim relates to a taxable period in which the taxpayer was a citizen of the requested State, and

   (b) Where the taxpayer is an entity that is a company, estate or trust, the revenue claim relates to a taxable period in which the taxpayer derived its status as such an entity from the laws in force in the requested State.

9. Notwithstanding the provisions of Article II (Taxes Covered), the provisions of this Article shall apply to all categories of taxes collected by or on behalf of the Government of a Contracting State.

10. Nothing in this Article shall be construed as:

   (a) Limiting the assistance provided for in paragraph 4 of Article XXVI (Mutual Agreement Procedure); or

   (b) Imposing on either Contracting State the obligation to carry out administrative measures of a different nature from those used in the collection of its own taxes or that would be contrary to its public policy (ordre public).

11. The competent authorities of the Contracting States shall agree upon the mode of application of this Article, including agreement to ensure comparable levels of assistance to each of the Contracting States."

Article 16

1. Paragraph 1 of Article XXVII (Exchange of Information) of the Convention shall be deleted and replaced by the following:

"1. The competent authorities of the Contracting States shall exchange such information as is relevant for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes to which the Convention applies insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Article I (Personal Scope). Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the taxation laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the administration and enforcement in respect of, or the determination of appeals in relation to the taxes to which the Convention applies or, notwithstanding paragraph 4, in relation to taxes imposed by a political subdivision or local authority of a Contracting State that are substantially similar to the taxes covered by the Convention under Article II (Taxes Covered). Such persons or authorities shall use the information only for such purposes. They may disclose

the information in public court proceedings or in judicial decisions. The competent authorities may release to an arbitration board established pursuant to paragraph 6 of Article XXVI (Mutual Agreement Procedure) such information as is necessary for carrying out the arbitration procedure; the members of the arbitration board shall be subject to the limitations on disclosure described in this Article."

2. Paragraph 4 of Article XXVII (Exchange of Information) of the Convention shall be deleted and replaced by the following:

"4. For the purposes of this Article, the Convention shall apply, notwithstanding the provisions of Article II (Taxes Covered):

(a) To all taxes imposed by a Contracting State; and

(b) To other taxes to which any other provision of the Convention applies, but only to the extent that the information is relevant for the purposes of the application of that provision."

Article 17

1. Paragraph 3(a) of the Article XXIX (Miscellaneous Rules) of the Convention shall be deleted and replaced by the following:

"(a) Under paragraphs 3 and 4 of Article IX (Related Persons), paragraphs 6 and 7 of Article XIII (Gains), paragraphs 1, 3, 4, 5, 6(b) and 7 of Article XVIII (Pensions and Annuities), paragraph 5 of Article XXIX (Miscellaneous Rules), paragraphs 1, 5 and 6 of Article XXIX B (Taxes Imposed by Reason of Death), paragraphs 2, 3, 4 and 7 of Article XXIX B (Taxes Imposed by Reason of Death) as applied to the estates of persons other than former citizens referred to in paragraph 2 of this Article, paragraphs 3 and 5 of Article XXX (Entry into Force), and Articles XIX (Government Service), XXI (Exempt Organizations), XXIV (Elimination of Double Taxation), XXV (Non-Discrimination) and XXVI (Mutual Agreement Procedure);"

2. Paragraphs 5 to 7 of Article XXIX (Miscellaneous Rules) of the Convention shall be deleted and replaced by the following:

"5. Where a person who is a resident of Canada and a shareholder of a United States S corporation requests the competent authority of Canada to do so, the competent authority may agree, subject to terms and conditions satisfactory to such competent authority, to apply the following rules for the purposes of taxation in Canada with respect to the period during which the agreement is effective:

(a) The corporation shall be deemed to be a controlled foreign affiliate of the person;

(b) All the income of the corporation shall be deemed to be foreign accrual property income;

(c) For the purposes of subsection 20(11) of the *Income Tax Act*, the amount of the corporation's income that is included in the person's income shall be deemed not to be income from a property; and

(d) Each dividend paid to the person on a share of the capital stock of the

corporation shall be excluded from the person's income and shall be deducted in computing the adjusted cost base to the person of the share.

6. For purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, the Contracting States agree that:

   (a) A measure falls within the scope of the Convention only if:

      (i) The measure relates to a tax to which Article XXV (Non-Discrimination) of the Convention applies; or

      (ii) The measure relates to a tax to which Article XXV (Non-Discrimination) of the Convention does not apply and to which any other provision of the Convention applies, but only to the extent that the measure relates to a matter dealt with in that other provision of the Convention; and

   (b) Notwithstanding paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services, any doubt as to the interpretation of subparagraph (a) will be resolved under paragraph 3 of Article XXVI (Mutual Agreement Procedure) of the Convention or any other procedure agreed to by both Contracting States.

7. The appropriate authority of a Contracting State may request consultations with the appropriate authority of the other Contracting State to determine whether change to the Convention is appropriate to respond to changes in the law or policy of that other State. Where domestic legislation enacted by a Contracting State unilaterally removes or significantly limits any material benefit otherwise provided by the Convention, the appropriate authorities shall promptly consult for the purpose of considering an appropriate change to the Convention."

Article 18

A new Article XXIX A (Limitation on Benefits) shall be added to the Convention as follows:

"Article XXIX A

Limitation on Benefits

1. For the purposes of the application of this Convention by the United States,

   (a) A qualifying person shall be entitled to all of the benefits of this Convention, and

   (b) Except as provided in paragraphs 3, 4 and 6, a person that is not a qualifying person shall not be entitled to any benefits of the Convention.

2. For the purposes of this Article, a qualifying person is a resident of Canada that is:

   (a) A natural person;

   (b) The Government of Canada or a political subdivision or local authority thereof, or any agency or instrumentality of any such government, subdivision or authority;

(c) A company or trust in whose principal class of shares or units there is substantial and regular trading on a recognized stock exchange;

(d) A company more than 50 per cent of the vote and value of the shares (other than debt substitute shares) of which is owned, directly or indirectly, by five or fewer persons each of which is a company or trust referred to in subparagraph (c), provided that each company or trust in the chain of ownership is a qualifying person or a resident or citizen of the United States;

(e) (i) A company 50 per cent or more of the vote and value of the shares (other than debt substitute shares) of which is not owned, directly or indirectly, by persons other than qualifying persons or residents or citizens of the United States, or

(ii) A trust 50 per cent or more of the beneficial interest in which is not owned, directly or indirectly, by persons other than qualifying persons or residents or citizens of the United States,

where the amount of the expenses deductible from gross income that are paid or payable by the company or trust, as the case may be, for its preceding fiscal period (or, in the case of its first fiscal period, that period) to persons that are not qualifying persons or residents or citizens of the United States is less than 50 per cent of its gross income for that period;

(f) An estate;

(g) A not-for-profit organization, provided that more than half of the beneficiaries, members or participants of the organization are qualifying persons or residents or citizens of the United States; or

(h) An organization described in paragraph 2 of Article XXI (Exempt Organizations) and established for the purpose of providing benefits primarily to individuals who are qualifying persons, persons who were qualifying persons within the five preceding years, or residents or citizens of the United States.

3. Where a person that is a resident of Canada and is not a qualifying person of Canada, or a person related thereto, is engaged in the active conduct of a trade or business in Canada (other than the business of making or managing investments, unless those activities are carried on with customers in the ordinary course of business by a bank, an insurance company, a registered securities dealer or a deposit-taking financial institution), the benefits of the Convention shall apply to that resident person with respect to income derived from the United States in connection with or incidental to that trade or business, including any such income derived directly or indirectly by that resident person through one or more other persons that are residents of the United States. Income shall be deemed to be derived from the United States in connection with the active conduct of a trade or business in Canada only if that trade or business is substantial in relation to the activity carried on in the United States giving rise to the income in respect of which benefits provided under the Convention by the United States are claimed.

4. A company that is a resident of Canada shall also be entitled to the benefits of Articles X (Dividends), XI (Interest) and XII (Royalties) if

(a) Its shares that represent more than 90 per cent of the aggregate vote and value represented by all of its shares (other than debt substitute shares)

are owned, directly or indirectly, by persons each of whom is a qualifying person, a resident or citizen of the United States or a person who

(i) Is a resident of a country with which the United States has a comprehensive income tax convention and is entitled to all of the benefits provided by the United States under that convention;

(ii) Would qualify for benefits under paragraphs 2 or 3 if that person were a resident of Canada (and, for the purposes of paragraph 3, if the business it carried on in the country of which it is a resident were carried on by it in Canada); and

(iii) Would be entitled to a rate of United States tax under the convention between that person's country of residence and the United States, in respect of the particular class of income for which benefits are being claimed under this Convention, that is a least as low as the rate applicable under this Convention; and

(b) The amount of the expenses deductible from gross income that are paid or payable by the company for its preceding fiscal period (or, in the case of its first fiscal period, that period) to persons that are not qualifying persons or residents or citizens of the United States is less than 50 per cent of the gross income of the company for that period.

5. For the purposes of this Article,

(a) The term "recognized stock exchange" means:

(i) The NASDAQ System owned by the National Association of Securities Dealers, Inc. and any stock exchange registered with the Securities and Exchange Commission as a national securities exchange for purposes of the Securities Exchange Act of 1934;

(ii) Canadian stock exchanges that are "prescribed stock exchanges" under the *Income Tax Act*; and

(iii) Any other stock exchange agreed upon by the Contracting States in an exchange of notes or by the competent authorities of the Contracting States;

(b) The term "not-for-profit organization" of a Contracting State means an entity created or established in that State and that is, by reason of its not-for-profit status, generally exempt from income taxation in that State, and includes a private foundation, charity, trade union, trade association or similar organization; and

(c) The term "debt substitute share" means;

(i) A share described in paragraph (e) of the definition "term preferred share" in the *Income Tax Act*, as it may be amended from time to time without changing the general principle thereof; and

(ii) Such other type of share as may be agreed upon by the competent authorities of the Contracting States.

6. Where a person that is a resident of Canada is not entitled under the preceding provisions of this Article to the benefits provided under the Convention by the United States, the competent authority of the United States shall, upon that person's request, determine on the basis of all factors including the history, structure, ownership and operations of that person whether

(a) Its creation and existence did not have as a principal purpose the obtaining of benefits under the Convention that would not otherwise be available; or

(b) It would not be appropriate, having regard to the purpose of this Article, to deny the benefits of the Convention to that person.

The person shall be granted the benefits of the Convention by the United States where the competent authority determines that subparagraph (a) or (b) applies.

7. It is understood that the fact that the preceding provisions of this Article apply only for the purposes of the application of the Convention by the United States shall not be construed as restricting in any manner the right of a Contracting State to deny benefits under the Convention where it can reasonably be concluded that to do otherwise would result in an abuse of the provisions of the Convention."

Article 19

A new Article XXIX B (Taxes Imposed by Reason of Death) shall be added to the Convention as follows:

"Article XXIX B

Taxes Imposed by Reason of Death

1. Where the property of an individual who is a resident of a Contracting State passes by reason of the individual's death to an organization referred to in paragraph 1 of Article XXI (Exempt Organizations), the tax consequences in a Contracting State arising out of the passing of the property shall apply as if the organization were a resident of that State.

2. In determining the estate tax imposed by the United States, the estate of an individual (other than a citizen of the United States) who was a resident of Canada at the time of the individual's death shall be allowed a unified credit equal to the greater of

(a) The amount that bears the same ratio to the credit allowed under the law of the United States to the estate of a citizen of the United States as the value of the part of the individual's gross estate that at the time of the individual's death is situated in the United States bears to the value of the individual's entire gross estate wherever situated; and

(b) The unified credit allowed to the estate of a nonresident not a citizen of the United States under the law of the United States.

The amount of any unified credit otherwise allowable under this paragraph shall be reduced by the amount of any credit previously allowed with respect to any gift made by the individual. A credit otherwise allowable under subparagraph (a) shall be allowed only if all information necessary for the verification and computation of the credit is provided.

3. In determining the estate tax imposed by the United States on an individual's estate with respect to property that passes to the surviving spouse of the individual (within the meaning of the law of the United States) and that would qualify for the estate tax marital deduction under the law of the United States

if the surviving spouse were a citizen of the United States and all applicable elections were properly made (in this paragraph and in paragraph 4 referred to as "qualifying property"), a non-refundable credit computed in accordance with the provisions of paragraph 4 shall be allowed in addition to the unified credit allowed to the estate under paragraph 2 or under the law of the United States provided that

(a) The individual was at the time of death a citizen of the United States or a resident of either Contracting State;

(b) The surviving spouse was at the time of the individual's death a resident of either Contracting State;

(c) If both the individual and the surviving spouse were residents of the United States at the time of the individual's death, one or both was a citizen of Canada; and

(d) The executor of the decedent's estate elects the benefits of this paragraph and waives irrevocably the benefits of any estate tax marital deduction that would be allowed under the law of the United States on a United States Federal estate tax return filed for the individual's estate by the date on which a qualified domestic trust election could be made under the law of the United States.

4. The amount of the credit allowed under paragraph 3 shall equal the lesser of

(a) The unified credit allowed under paragraph 2 or under the law of the United States (determined without regard to any credit allowed previously with respect to any gift made by the individual), and

(b) The amount of estate tax that would otherwise be imposed by the United States on the transfer of qualifying property.

The amount of estate tax that would otherwise be imposed by the United States on the transfer of qualifying property shall equal the amount by which the estate tax (before allowable credits) that would be imposed by the United States if the qualifying property were included in computing the taxable estate exceeds the estate tax (before allowable credits) that would be so imposed if the qualifying property were not so included. Solely for purposes of determining other credits allowed under the law of the United States, the credit provided under paragraph 3 shall be allowed after such other credits.

5. Where an individual was a resident of the United States immediately before the individual's death, for the purposes of subsection 70(6) of the *Income Tax Act*, both the individual and the individual's spouse shall be deemed to have been resident in Canada immediately before the individual's death. Where a trust that would be a trust described in subsection 70(6) of that Act, if its trustees that were residents or citizens of the United States or domestic corporations under the law of the United States were residents of Canada, requests the competent authority of Canada to do so, the competent authority may agree, subject to terms and conditions satisfactory to such competent authority, to treat the trust for the purposes of that Act as being resident in Canada for such time as may be stipulated in the agreement.

6. In determining the amount of tax payable in Canada for a taxation year by an individual who immediately before death was a resident of Canada, or by a trust described in subsection 70(6) of the *Income Tax Act* (or a trust which is treated as being resident in Canada under the provisions of paragraph 5), the amount of any Federal or state estate or inheritance taxes payable in the

United States (not exceeding, where the individual was a citizen of the United States or a former citizen referred to in paragraph 2 of Article XXIX (Miscellaneous Rules), the amount of estate and inheritance taxes that would have been payable if the individual were not a citizen or former citizen of the United States) in respect of the property situated within the United States shall,

(a) To the extent that such estate or inheritance taxes are imposed upon the individual's death, be allowed as a deduction from the amount of any Canadian tax otherwise payable by the individual for the taxation year in which the individual died on the total of

(i) Any income, profits or gains of the individual arising (within the meaning of paragraph 3 of Article XXIV (Elimination of Double Taxation)) in the United States in that year, and

(ii) Where the value at the time of the individual's death of the individual's entire gross estate wherever situated (determined under the law of the United States) exceeded 1.2 million U.S. dollars or its equivalent in Canadian dollars, any income, profits or gains of the individual for that year from property situated in the United States at that time, and

(b) To the extent that such estate or inheritance taxes are imposed upon the death of the individual's surviving spouse, be allowed as a deduction from the amount of any Canadian tax otherwise payable by the trust for its taxation year in which that spouse dies on any income, profits or gains of the trust for that year arising (within the meaning of paragraph 3 of Article XXIV (Elimination of Double Taxation)) in the United States or from property situated in the United States at the time of death of the spouse.

For purposes of this paragraph, property shall be treated as situated within the United States if it is so treated for estate tax purposes under the law of the United States as in effect on March 17, 1995, subject to any subsequent changes thereof that the competent authorities of the Contracting States have agreed to apply for the purposes of this paragraph. The deduction allowed under this paragraph shall take into account the deduction for any income tax paid or accrued to the United States that is provided under paragraph 2(a), 4(a) or 5(b) of Article XXIV (Elimination of Double Taxation).

7. In determining the amount of estate tax imposed by the United States on the estate of an individual who was a resident or citizen of the United States at the time of death, or upon the death of a surviving spouse with respect to a qualified domestic trust created by such an individual or the individual's executor or surviving spouse, a credit shall be allowed against such tax imposed in respect of property situated outside the United States, for the federal and provincial income taxes payable in Canada in respect of such property by reason of the death of the individual or, in the case of a qualified domestic trust, the individual's surviving spouse. Such credit shall be computed in accordance with the following rules:

(a) A credit otherwise allowable under this paragraph shall be allowed regardless of whether the identity of the taxpayer under the law of Canada corresponds to that under the law of the United States.

(b) The amount of a credit allowed under this paragraph shall be computed in accordance with the provisions and subject to the limitations of the law of the United States regarding credit for foreign death taxes (as it may be

amended from time to time without changing the general principle hereof), as though the income tax imposed by Canada were a creditable tax under that law.

(c) A credit may be claimed under this paragraph for an amount of federal or provincial income tax payable in Canada only to the extent that no credit or deduction is claimed for such amount in determining any other tax imposed by the United States, other than the estate tax imposed on property in a qualified domestic trust upon the death of the surviving spouse.

8. Provided that the value, at the time of death, of the entire gross estate wherever situated of an individual who was a resident of Canada (other than a citizen of the United States) at the time of death does not exceed 1.2 million U.S. dollars or its equivalent in Canadian dollars, the United States may impose its estate tax upon property forming part of the estate of the individual only if any gain derived by the individual from the alienation of such property would have been subject to income taxation by the United States in accordance with Article XIII (Gains)."

Article 20

1. The appropriate authorities of the Contracting States shall consult within a three-year period from the date on which this Protocol enters into force with respect to further reductions in withholding taxes provided in the Convention, and with respect to the rules in Article XXIX A (Limitation on Benefits) of the Convention.

2. The appropriate authorities of the Contracting States shall consult after a three-year period from the date on which the Protocol enters into force in order to determine whether it is appropriate to make the exchange of notes referred to in of Article XXVI (Mutual Agreement Procedure) of the Convention.

Article 21

1. This Protocol shall be subject to ratification in accordance with the applicable procedures in Canada and the United States and instruments of ratification shall be exchanged as soon as possible.

2. The Protocol shall enter into force upon the exchange of instruments of ratification, and shall have effect:

(a) For tax withheld at the source on income referred to in Articles X (Dividends), XI (Interest), XII (Royalties) and XVIII (Pensions and Annuities) of the Convention (as it read before the entry into force of this Protocol), with respect to amounts paid or credited on or after the first day of the second month next following the date on which the Protocol enters into force, except that the reference in paragraph 2(a) of Article X (Dividends) of the Convention, as amended by the Protocol, to "5 per cent" shall be read, in its application to amounts paid or credited on or after the first day:

(i) Before 1996, as "7 per cent"; and

(ii) After 1995 and before 1997, as "6 per cent"; and

(b) For other taxes, with respect to taxable years beginning on or after the first day of January next following the date on which the Protocol enters into force, except that the reference in paragraph 6 of Article X (Dividends) of the Con-

vention, as amended by the Protocol, to "5 per cent" shall be read, in its application to taxable years beginning on or after that first day and ending before 1997, as "6 per cent".

3. Notwithstanding the provisions of paragraph 2, Article XXVI A (Assistance in Collection) of the Convention shall have effect for revenue claims finally determined by a requesting State after the date that is 10 years before the date on which the Protocol enters into force.

4. Notwithstanding the provisions of paragraph 2, paragraphs 2 through 8 of Article XXIX B (Taxes Imposed by Reason of Death) of the Convention (and paragraph 2 of Article II (Taxes Covered) and paragraph 3(a) of Article XXIX (Miscellaneous Rules) of the Convention, as amended by the Protocol, to the extent necessary to implement paragraphs 2 through 8 of Article XXIX B (Taxes Imposed by Reason of Death) of the Convention) shall, notwithstanding any limitation imposed under the law of a Contracting State on the assessment, reassessment or refund with respect to a person's return, have effect with respect to deaths occurring after the date on which the Protocol enters into force and, provided that any claim for refund by reason of this sentence is filed within one year of the date on which the Protocol enters into force or within the otherwise applicable period for filing such claims under domestic law, with respect to benefits provided under any of those paragraphs with respect to deaths occurring after November 10, 1988.

5. Notwithstanding the provisions of paragraph 2, paragraph 2 of Article 3 of the Protocol shall have effect with respect to taxable years beginning on or after the first day of January next following the date on which the Protocol enters into force.

IN WITNESS WHEREOF, the undersigned, duly authorized thereto by their respective Governments, have signed this Protocol.

Done in two copies at Washington this seventeenth day of March 1995, in the English and French languages, each text being equally authentic.

For the Government of Canada:

For the Government of the United States of America:

FOURTH PROTOCOL AMENDING THE CONVENTION BETWEEN CANADA AND THE UNITED STATES OF AMERICA WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL SIGNED AT WASHINGTON ON SEPTEMBER 26, 1980 AS AMENDED BY THE PROTOCOLS SIGNED ON JUNE 14, 1983, MARCH 28, 1984 AND MARCH 17, 1995

Canada and the United States of America, desiring to conclude a Protocol to amend the Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital signed at Washington on September 26, 1980, as amended by the Protocols signed on June 14, 1983, March 28, 1984 and March 17, 1995 (hereinafter referred to as "the Convention"), have agreed as follows:

Article 1

1. Paragraph 3(a) of Article XIII (Gains) of the Convention shall be deleted and replaced by the following:

   "**(a)** In the case of real property situated in the United States, means a United States real property interest and real property referred to in Article VI (Income from Real Property) situated in the United States, but does not include a share of the capital stock of a company that is not a resident of the United States; and"

2. Paragraph 3(b)(ii) of Article XIII (Gains) of the Convention shall be deleted and replaced by the following:

   "**(ii)** A share of the capital stock of a company that is a resident of Canada, the value of whose shares is derived principally from real property situated in Canada; and"

Article 2

1. Paragraph 3 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

   "**3.** For the purposes of this Convention, the term "pensions" includes any payment under a superannuation, pension or other retirement arrangement, Armed Forces retirement pay, war veterans pensions and allowances and amounts paid under a sickness, accident or disability plan, but does not include payments under an income-averaging annuity contract or, except for the purposes of Article XIX (Government Service), any benefit referred to in paragraph 5."

2. Paragraph 5 of Article XVIII (Pensions and Annuities) of the Convention shall be deleted and replaced by the following:

   "**5.** Benefits under the social security legislation in a Contracting State (including tier 1 railroad retirement benefits but not including unemployment benefits) paid to a resident of the other Contracting State shall be taxable only in that other State, subject to the following conditions:

   (a) a benefit under the social security legislation in the United States

paid to a resident of Canada shall be taxable in Canada as though it were a benefit under the Canada Pension Plan, except that 15 per cent of the amount of the benefit shall be exempt from Canadian tax; and

(b) a benefit under the social security legislation in Canada paid to a resident of the United States shall be taxable in the United States as though it were a benefit under the Social Security Act, except that a type of benefit that is not subject to Canadian tax when paid to residents of Canada shall be exempt from United States tax."

Article 3

1. This Protocol shall be subject to ratification in accordance with the applicable procedures in Canada and the United States and instruments of ratification shall be exchanged as soon as possible.

2. This Protocol shall enter into force upon the exchange of instruments of ratification, and shall have effect as follows:

   (a) Article 1 of this Protocol shall have effect as of April 26, 1995; and

   (b) Article 2 of this Protocol shall have effect with respect to amounts paid or credited to a resident of the other Contracting State after 1995, except that where a Contracting State has, in accordance with the Convention read without reference to this Protocol, imposed a tax on benefits paid or credited under the social security legislation in that State, and those benefits are paid or credited after 1995 and

      (i) before the calendar year in which this Protocol enters into force, if this Protocol enters into force before September 1 of that year, or

      (ii) before the end of the calendar year in which this Protocol enters into force, if this Protocol enters into force after August 31 of that year,

   Article 2 shall only have effect with respect to such benefits (referred to in this Article as "source-taxed benefits") as described in paragraphs 3, 4 and 5.

3. With respect to source-taxed benefits paid by a Contracting State to a resident of the other Contracting State, Article 2 applies only if the resident has, within three years after the date on which this Protocol enters into force, applied to the competent authority of the first-mentioned Contracting State for a refund of the tax imposed on the benefits. However, with respect to source-taxed benefits paid by the United States to a resident of Canada, the competent authority of Canada shall:

   (a) apply for and receive such refund on behalf of the resident;

   (b) remit to the resident, in accordance with the law of Canada governing refunds of income tax overpayments, such refund less any tax imposed in Canada on the benefits in accordance with Article 2 of this Protocol; and

   (c) make the application referred to in subparagraph (a) only if the additional tax that would be imposed in Canada on the benefits, on the assumption that Article 2 of this Protocol applied, would be less than the tax imposed in the United States on the benefits as a result of paragraph 5 of Article XVIII (Pensions and Annuities) of the Convention read without reference to this Protocol.

4. All taxes refunded as a result of this Protocol shall be refunded without interest and interest on any taxes of a resident of a Contracting State assessed as a result

of this Protocol shall be computed as though those taxes became payable no earlier than December 31 of the year following the year in which this Protocol enters into force.

5. The competent authorities of the Contracting States shall establish procedures for making or revoking the application referred to in paragraph 3 and shall agree on such additional procedures as are necessary to ensure the appropriate implementation of this Protocol.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Protocol.

Done at Ottawa in duplicate, in the English and French languages, both texts being equally authentic, this 29th day of July, 1997.

For Canada:	For the United States of America:
Michael Leir	Vladimir Sambaiew

[The next page is 17,229-9]

42-43-44 ELIZABETH II

CHAPTER 34

An Act to amend the Canada-United States Tax Convention Act, 1984

[*Assented to 8th November, 1995*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

CANADA-UNITED STATES TAX CONVENTION ACT, 1984

1. Section 2 of the *Canada-United States Tax Convention Act, 1984* is replaced by the following:

Definition of "Convention"

2. In this Act, "Convention" means the Convention between the Government of Canada and the Government of the United States set out in Schedule I, as amended by the Protocols set out in Schedules II, III and IV.

2. Section 3 of the Act is amended by adding the following after subsection (2):

Inconsistent laws

(2.1) In the event of any inconsistency between the provisions of the *Income Tax Conventions Interpretation Act* and the provisions of the Convention, and provisions of that Act prevail to the extent of the inconsistency.

3. The Act is amended by adding, after Schedule III, Schedule IV, as set out in the schedule to this Act.

GENERAL

4. The Minister of Finance shall cause a notice of the day on which the Protocol set out in the schedule to this Act comes into force to be published in the *Canada Gazette* within sixty days after it comes into force.

[The next page is 17,231]

Ottawa, December 8, 1994
94-120

TAXATION OF NON-RESIDENTS' CPP/OPP, OAS BENEFITS DEFERRED

Finance Minister Paul Martin announced today that non-resident individuals who receive Canada Pension Plan (or Quebec Pension Plan) and Old Age Security benefits will become taxable on those benefits as of January 1, 1996 — one year later than originally planned.

Currently, CPP/QPP and OAS payments are taxed only if the recipient resides in Canada. On August 31, 1994, Mr. Martin announced that non-residents would pay non-resident withholding tax on CPP/QPP and OAS amounts received after 1994.

The planned change was timed to coincide with the effective date of the recently-signed Protocol to the Canada-United States tax Convention. In its current form, the Convention allows Canada to tax residents of Canada who receive U.S. social security benefits, but not U.S. residents who receive CPP/QPP and OAS benefits from Canada. The Protocol will instead allow each country to tax any social security payments it makes to residents of the other country.

"It is now clear that the Protocol will not be ratified this year," Mr. Martin explained. "Delaying this tax change will keep our domestic law in line with one of our most important tax treaties."

The Minister also noted that the one-year postponement will allow Human Resources Development Canada more time to both advise recipients of the change, and put in place the necessary systems to withhold the tax.

For further information:

Lawrence Purdy
Tax Legislation Division
(613) 996-0602

Editorial Comment: Mr. Martin's prophesy proved correct. The Third Protocol was revised, and that revised version was signed on March 17, 1995.

[The next page is 17,501]

ANNEXE D

PARAGRAPHE 241(4) DE LA LOI DE L'IMPÔT SUR LE REVENU

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PARAGRAPHE 241(4) DE LA LOI DE L'IMPÔT SUR LE REVENU

Un fonctionnaire peut :

a) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à l'application ou à l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi*, mais uniquement à cette fin;

b) fournir à une personne un renseignement confidentiel qu'il est raisonnable de considérer comme nécessaire à la détermination de quelque impôt, intérêt, pénalité ou autre montant payable par la personne, ou pouvant le devenir, ou de quelque crédit d'impôt ou remboursement auquel elle a droit, ou pourrait avoir droit, en vertu de la présente loi, ou de tout autre montant à prendre en compte dans une telle détermination;

c) fournir, mais uniquement en vue de la gestion d'un régime de pension agréé, l'attestation visée à l'alinéa 147.1(10)*a*), ou le refus de la faire, à la personne qui la demande;

d) fournir un renseignement confidentiel :

(i) à un fonctionnaire du ministère des Finances, mais uniquement en vue de la formulation ou l'évaluation de la politique fiscale,

(ii) à un fonctionnaire, mais uniquement en vue de la mise à exécution de la politique fiscale ou en vue de l'application ou de l'exécution d'une loi fédérale qui prévoit l'imposition et la perception d'un impôt, d'une taxe ou d'un droit,

(iii) à un fonctionnaire, mais uniquement en vue de l'application ou de l'exécution d'une loi provinciale qui prévoit l'imposition ou la perception d'un impôt, d'une taxe ou d'un droit,

(iv) à un fonctionnaire provincial, mais uniquement en vue de la formulation ou de l'évaluation de la politique fiscale,

(v) à un fonctionnaire du ministère des Ressources naturelles ou à un fonctionnaire provincial, mais uniquement en vue de l'application ou de la mise en oeuvre d'un programme fédéral ou provincial relatif à l'exploration ou à l'exploitation afférentes aux ressources pétrolières et gazières canadiennes,

(vi) à un fonctionnaire d'un gouvernement provincial qui a reçu ou est en droit de recevoir un paiement, au titre du revenu imposable d'une société gagné dans la zone extra côtière de la province, en vertu de la *Loi de mise en oeuvre de l'Accord Canada - Nouvelle-Écosse sur les hydrocarbures extracôtiers*, chapitre 28 des Lois du Canada de 1988, de la *Loi de mise en oeuvre de l'Accord atlantique Canada - Terre-Neuve*, chapitre 3 des Lois du Canada de 1987, ou d'une loi semblable concernant l'exploration ou l'exploitation afférentes aux ressources pétrolières et gazières canadiennes au large des côtes, soit à un fonctionnaire du ministère des Ressources naturelles, mais uniquement en vue de l'application des dispositions concernant ces paiements à une province,

(vi.1) à un fonctionnaire du ministère des Ressources naturelles, mais uniquement en vue de déterminer si un bien constitue un bien économisant l'énergie visé par règlement ou si une

dépense engagée ou effectuée constitue des frais liés aux énergies renouvelables et à l'économie d'énergie au Canada,

(vii) à un fonctionnaire, mais uniquement en vue de l'application ou de l'exécution de la *Loi de 1985 sur les normes de prestation de pension* ou d'une loi provinciale semblable,

(vii.1) à un fonctionnaire du ministère du Développement des ressources humaines ou à un fonctionnaire visé par règlement, mais uniquement en vue de l'application ou de l'exécution de la partie III.1 de la *Loi sur le ministère du Développement des ressources humaines*,

(viii) à un fonctionnaire du ministère des Anciens combattants, mais uniquement en vue de l'application de la *Loi sur les allocations aux anciens combattants* ou de la partie XI de la *Loi sur les avantages liés à la guerre pour les anciens combattants de la marine marchande et les civils*,

(ix) à un fonctionnaire d'un ministère ou organisme fédéral ou provincial, quant aux nom, adresse et profession d'un contribuable et à la taille et au genre de son entreprise mais uniquement en vue de permettre à ce ministère ou à cet organisme de recueillir des données statistiques pour la recherche et l'analyse.

(x) à un fonctionnaire de la Commission de l'emploi et de l'assurance du Canada ou du ministère de l'Emploi et de l'Immigration, mais uniquement en vue de l'application ou de l'exécution de la *Loi sur l'assurance-chômage*, de la *Loi sur l'assurance-emploi* ou d'un programme d'emploi du gouvernement fédéral, ou en vue de l'évaluation ou de la formulation de la politique concernant cette loi ou un tel programme,

(xi) à un fonctionnaire du ministère de l'Agriculture et de l'Agroalimentaire ou à un fonctionnaire provincial, mais uniquement en vue de l'application ou de la mise en oeuvre d'un régime ou programme fédéral ou provincial institué au titre d'un accord conclu en application de la *Loi sur la protection du revenu agricole*,

(xii) à un fonctionnaire du ministère du Patrimoine canadien ou à un membre de la Commission canadienne d'examen des exportations de biens culturels, mais uniquement en vue de l'application des articles 32 à 33.2 de la *Loi sur l'exportation et l'importation de biens culturels*,

(xiii) à un fonctionnaire, mais uniquement en vue de procéder, par voie de compensation, à la retenue, sur toute somme due par Sa Majesté du chef du Canada, de tout montant égal à une créance :

(A) soit de Sa Majesté du chef du Canada,

(B) soit de Sa Majesté du chef d'une province,

(xiv) à un fonctionnaire, mais uniquement pour l'application de l'article 7.1 de la *Loi sur les arrangements fiscaux entre le gouvernement fédéral et les provinces et sur les contributions fédérales en matière d'enseignement postsecondaire et de santé;*

e) fournir un renseignement confidentiel, ou en permettre l'examen ou l'accès, en conformité avec les dispositions ou documents suivants, mais uniquement pour leur application :

(i) le paragraphe 36(2) ou l'article 46 de la *Loi sur l'accès à l'information*,

(ii) l'article 13 de la *Loi sur le vérificateur général*,

(iii) l'article 92 du *Régime de pensions du Canada*,

(iv) un mandat décerné aux termes du paragraphe 21(3) de la *Loi sur le service canadien du renseignement de sécurité*,

(v) une ordonnance rendue en vertu du paragraphe 462.48(3) du *Code criminel*,

(vi) l'article 26 de la *Loi sur l'exportation et l'importation de biens culturels*,

(vii) l'article 79 de la *Loi d'aide à l'exécution des ordonnances et des ententes familiales*,

(viii) l'alinéa 33.11*a*) de la *Loi sur la sécurité de la vieillesse*,

(ix) le paragraphe 34(2) ou l'article 45 de la *Loi sur la protection des renseignements personnels*,

(x) l'article 24 de la *Loi sur la statistique*,

(xi)l'article 9 de la *Loi sur la cession du droit au remboursement en matière d'impôt*,

(xii) une disposition de quelque convention ou accord fiscal entre le Canada et un autre pays, qui a force de loi au Canada;

f) fournir un renseignement confidentiel, mais uniquement pour l'application des articles 23 à 25 de la *Loi sur la gestion des finances publiques*;

g) utiliser un renseignement confidentiel en vue de compiler des renseignements sous une forme qui ne révèle pas, même indirectement, l'identité du contribuable en cause;

h) utiliser ou fournir un renseignement confidentiel, mais uniquement à une fin liée à la surveillance ou à l'évaluation d'une personne autorisée, ou à des mesures disciplinaires prises à son endroit, par Sa Majesté du chef du Canada relativement à une période au cours de laquelle la personne autorisée était soit employée par Sa Majesté du chef du Canada, soit engagée par elle ou en son nom, pour aider à l'application ou à l'exécution de la présente loi, du *Régime de pensions du Canada*, de la *Loi sur l'assurance-chômage* ou de la *Loi sur l'assurance-emploi*, dans la mesure où le renseignement a rapport à cette fin;

i) donner accès à des documents renfermant des renseignements confidentiels à l'archiviste national du Canada ou à une personne agissant en son nom ou sur son ordre, mais uniquement pour l'application de l'article 5 de la *Loi sur les Archives nationales du Canada*, et transférer de tels documents sous la garde et le contrôle de ces personnes, mais uniquement pour l'application de l'article 6 de cette loi;

j) utiliser un renseignement confidentiel concernant un contribuable en vue de lui fournir un renseignement;

j.1) fournir un renseignement confidentiel à un fonctionnaire ou à une personne déterminée, mais uniquement en vue de permettre que soit effectué à l'égard d'un des paiements suivants un redressement ayant pour objet de prendre en compte le montant déterminé selon l'élément C de la formule figurant au

paragraphe 122.61(1) à l'égard d'une personne pour une année d'imposition;

(i) un paiement d'assistance sociale effectué après examen des ressources, des besoins et du revenu,

(ii) un paiement prévu par une loi provinciale visée par règlement à l'égard d'un enfant au sens de cette loi,

k) fournir un renseignement confidentiel à une personne qui y a légalement droit par ailleurs par l'effet d'une loi fédérale, ou lui en permettre l'examen ou l'accès, mais uniquement aux fins auxquelles elle y a droit;

l) fournir, à un fonctionnaire d'un ministère ou organisme fédéral ou provincial, le numéro d'entreprise, le nom, l'adresse et les numéros de téléphone et de télécopieur d'un détenteur d'un numéro d'entreprise, mais uniquement en vue de l'application ou de l'exécution d'une loi fédérale ou provinciale, à condition que le détenteur du numéro d'entreprise soit tenu par cette loi de fournir l'information, sauf le numéro d'entreprise, au ministère ou à l'organisme :

m) fournir un renseignement confidentiel à un fonctionnaire d'un gouvernement provincial, mais uniquement à une fin liée à la gestion ou à l'administration par ce gouvernement d'un programme concernant les versements faits aux termes du paragraphe 164(1.8).

ANNEXE E

L'ARTICLE 6103 DU CODE

Sec. 6103. Confidentiality and disclosure of returns and return information

- (a) General rule
  Returns and return information shall be confidential, and except as authorized by this title -
  - (1) no officer or employee of the United States,
  - (2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and
  - (3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6) or (12) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

- (b) Definitions
  For purposes of this section -
  - (1) Return
    The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.
  - (2) Return information
    The term "return information" means -
    - (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
    - (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,
      but such term does not include data in a form which cannot be

associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

- (3) Taxpayer return information
  The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.
- (4) Tax administration
  The term "tax administration" -
  - (A) means -
    - (i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and
    - (ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and
  - (B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.
- (5) State
  The term "State" means -
  - (A) any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and
  - (B) for purposes of subsections (a)(2), (b)(4), (d)(1),
    - () for purposes of subsections (a)(2), (b)(4), (d)(1),
      - (i) with a population in excess of 250,000 (as determined under the most recent decennial United States census data available),
      - (ii) which imposes a tax on income or wages, and
      - (iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.
  - (6) Taxpayer identity
    The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.
  - (7) Inspection
    The terms "inspected" and "inspection" mean any examination

of a return or return information.

- (8) Disclosure
  The term "disclosure" means the making known to any person in any manner whatever a return or return information.
- (9) Federal agency
  The term "Federal agency" means an agency within the meaning of section 551(1) of title 5, United States Code.
- (10) Chief executive officer
  The term "chief executive officer" means, with respect to any municipality, any elected official and the chief official (even if not elected) of such municipality.

- (c) Disclosure of returns and return information to designee of taxpayer

The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

- (d) Disclosure to State tax officials and State and local law enforcement agencies
  - (1) In general
    Returns and return information with respect to taxes imposed by chapters 1, 2, 6, 11, 12, 21, 23, 24, 31, 32, 44, 51, and 52 and subchapter D of chapter 36 shall be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws, including any procedures with respect to locating any person who may be entitled to a refund. Such inspection shall be permitted, or such disclosure made, only upon written request by the head of such agency, body, or commission, and only to the representatives of such agency, body, or commission designated in such written request as the individuals who are to inspect or to receive the returns or return information on behalf of such agency, body, or commission. Such representatives shall not include any individual who is the chief executive officer of such State or who is neither an employee or legal representative of such agency, body, or commission nor a person described in subsection (n). However, such return information shall not be disclosed to the extent that the Secretary determines that such disclosure would identify a confidential informant or seriously impair any civil or criminal tax investigation.
  - (2) Disclosure to State audit agencies

- (A) In general
  Any returns or return information obtained under paragraph (1) by any State agency, body, or commission may be open to inspection by, or disclosure to, officers and employees of the State audit agency for the purpose of, and only to the extent necessary in, making an audit of the State agency, body, or commission referred to in paragraph (1).
- (B) State audit agency
  For purposes of subparagraph (A), the term "State audit agency" means any State agency, body, or commission which is charged under the laws of the State with the responsibility of auditing State revenues and programs.

- (3) Exception for reimbursement under section 7624
  Nothing in this section shall be construed to prevent the Secretary from disclosing to any State or local law enforcement agency which may receive a payment under section 7624 the amount of the recovered taxes with respect to which such a payment may be made.
- (4) Availability and use of death information
  - (A) In general
    No returns or return information may be disclosed under paragraph (1) to any agency, body, or commission of any State (or any legal representative thereof) during any period during which a contract meeting the requirements of subparagraph (B) is not in effect between such State and the Secretary of Health and Human Services.
  - (B) Contractual requirements
    A contract meets the requirements of this subparagraph if -
    - (i) such contract requires the State to furnish the Secretary of Health and Human Services information concerning individuals with respect to whom death certificates (or equivalent documents maintained by the State or any subdivision thereof) have been officially filed with it, and
    - (ii) such contract does not include any restriction on the use of information obtained by such Secretary pursuant to such contract, except that such contract may provide that such information is only to be used by the Secretary (or any other Federal agency) for purposes of ensuring that Federal benefits or other payments are not erroneously paid to deceased individuals.

    Any information obtained by the Secretary of Health and Human Services under such a contract shall be exempt from disclosure under section 552 of title 5, United States Code, and from the requirements of section 552a of such title 5.
  - (C) Special exception
    The provisions of subparagraph (A) shall not apply to any State which on July 1, 1993, was not, pursuant to a contract, furnishing the Secretary of Health and Human Services

information concerning individuals with respect to whom death certificates (or equivalent documents maintained by the State or any subdivision thereof) have been officially filed with it.

- (e) Disclosure to persons having material interest
  - (1) In general
    The return of a person shall, upon written request, be open to inspection by or disclosure to -
    - (A) in the case of the return of an individual -
      - (i) that individual,
      - (ii) if property transferred by that individual to a trust is sold or exchanged in a transaction described in section 644, the trustee or trustees, jointly or separately, of such trust to the extent necessary to ascertain any amount of tax imposed upon the trust by section 644,
      - (iii) the spouse of that individual if the individual and such spouse have signified their consent to consider a gift reported on such return as made one-half by him and one-half by the spouse pursuant to the provisions of section 2513; or
      - (iv) the child of that individual (or such child's legal representative) to the extent necessary to comply with the provisions of section 1(g) or 59(j);
    - (B) in the case of an income tax return filed jointly, either of the individuals with respect to whom the return is filed;
    - (C) in the case of the return of a partnership, any person who was a member of such partnership during any part of the period covered by the return;
    - (D) in the case of the return of a corporation or a subsidiary thereof -
      - (i) any person designated by resolution of its board of directors or other similar governing body,
      - (ii) any officer or employee of such corporation upon written request signed by any principal officer and attested to by the secretary or other officer,
      - (iii) any bona fide shareholder of record owning 1 percent or more of the outstanding stock of such corporation,
      - (iv) if the corporation was a foreign personal holding company, as defined by section 552, any person who was a shareholder during any part of a period covered by such return if with respect to that period, or any part thereof, such shareholder was required under section 551 to include in his gross income undistributed foreign personal holding company income of such company,
      - (v) if the corporation was an electing small business corporation under subchapter S of chapter 1, any person who was a shareholder during any part of the period covered by such return during which an election was in effect, or
      - (vi) if the corporation has been dissolved, any person authorized by applicable State law to act for the corporation

or any person who the Secretary finds to have a material interest which will be affected by information contained therein;

- (E) in the case of the return of an estate -
  - (i) the administrator, executor, or trustee of such estate, and
  - (ii) any heir at law, next of kin, or beneficiary under the will, of the decedent, but only if the Secretary finds that such heir at law, next of kin, or beneficiary has a material interest which will be affected by information contained therein; and
- (F) in the case of the return of a trust -
  - (i) the trustee or trustees, jointly or separately, and
  - (ii) any beneficiary of such trust, but only if the Secretary finds that such beneficiary has a material interest which will be affected by information contained therein.

- (2) Incompetency
  If an individual described in paragraph (1) is legally incompetent, the applicable return shall, upon written request, be open to inspection by or disclosure to the committee, trustee, or guardian of his estate.
- (3) Deceased individuals
  The return of a decedent shall, upon written request, be open to inspection by or disclosure to -
  - (A) the administrator, executor, or trustee of his estate, and
  - (B) any heir at law, next of kin, or beneficiary under the will, of such decedent, or a donee of property, but only if the Secretary finds that such heir at law, next of kin, beneficiary, or donee has a material interest which will be affected by information contained therein.
- (4) Title 11 cases and receivership proceedings
  If -
  - (A) there is a trustee in a title 11 case in which the debtor is the person with respect to whom the return is filed, or
  - (B) substantially all of the property of the person with respect to whom the return is filed is in the hands of a receiver,

  such return or returns for prior years of such person shall, upon written request, be open to inspection by or disclosure to such trustee or receiver, but only if the Secretary finds that such trustee or receiver, in his fiduciary capacity, has a material interest which will be affected by information contained therein.
- (5) Individual's title 11 case
  - (A) In general
    In any case to which section 1398 applies (determined without regard to section 1398(b)(1)), any return of the debtor for the taxable year in which the case commenced or any preceding

taxable year shall, upon written request, be open to inspection by or disclosure to the trustee in such case.

- (B) Return of estate available to debtor
  Any return of an estate in a case to which section 1398 applies shall, upon written request, be open to inspection by or disclosure to the debtor in such case.
- (C) Special rule for involuntary cases
  In an involuntary case, no disclosure shall be made under subparagraph (A) until the order for relief has been entered by the court having jurisdiction of such case unless such court finds that such disclosure is appropriate for purposes of determining whether an order for relief should be entered.

- (6) Attorney in fact
  Any return to which this subsection applies shall, upon written request, also be open to inspection by or disclosure to the attorney in fact duly authorized in writing by any of the persons described in paragraph (1), (2), (3), (4), or (5) to inspect the return or receive the information on his behalf, subject to the conditions provided in such paragraphs.
- (7) Return information
  Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.
- (8) Disclosure of collection activities with respect to joint return
  If any deficiency of tax with respect to a joint return is assessed and the individuals filing such return are no longer married or no longer reside in the same household, upon request in writing by either of such individuals, the Secretary shall disclose in writing to the individual making the request whether the Secretary has attempted to collect such deficiency from such other individual, the general nature of such collection activities, and the amount collected. The preceding sentence shall not apply to any deficiency which may not be collected by reason of section 6502.
- (9) Disclosure of certain information where more than 1 person subject to penalty under section 6672
  If the Secretary determines that a person is liable for a penalty under section 6672(a) with respect to any failure, upon request in writing of such person, the Secretary shall disclose in writing to such person -
  - (A) the name of any other person whom the Secretary has determined to be liable for such penalty with respect to such failure, and
  - (B) whether the Secretary has attempted to collect such penalty from such other person, the general nature of such

collection activities, and the amount collected.

- (f) Disclosure to Committees of Congress
  - (1) Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation
    Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.
  - (2) Chief of Staff of Joint Committee on Taxation
    Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.
  - (3) Other committees
    Pursuant to an action by, and upon written request by the chairman of, a committee of the Senate or the House of Representatives (other than a committee specified in paragraph (1)) specially authorized to inspect any return or return information by a resolution of the Senate or the House of Representatives or, in the case of a joint committee (other than the joint committee specified in paragraph (1)) by concurrent resolution, the Secretary shall furnish such committee, or a duly authorized and designated subcommittee thereof, sitting in closed executive session, with any return or return information which such resolution authorizes the committee or subcommittee to inspect. Any resolution described in this paragraph shall specify the purpose for which the return or return information is to be furnished and that such information cannot reasonably be obtained from any other source.
  - (4) Agents of committees and submission of information to Senate or House of Representatives
    - (A) Committees described in paragraph (1)
      Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff

may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

- (B) Other committees
  Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

- (g) Disclosure to President and certain other persons
  - (1) In general
    Upon written request by the President, signed by him personally, the Secretary shall furnish to the President, or to such employee or employees of the White House Office as the President may designate by name in such request, a return or return information with respect to any taxpayer named in such request. Any such request shall state -
    - (A) the name and address of the taxpayer whose return or return information is to be disclosed,
    - (B) the kind of return or return information which is to be disclosed,
    - (C) the taxable period or periods covered by such return or return information, and
    - (D) the specific reason why the inspection or disclosure is requested.

- (2) Disclosure of return information as to Presidential appointees and certain other Federal Government appointees
  The Secretary may disclose to a duly authorized representative of the Executive Office of the President or to the head of any Federal agency, upon written request by the President or head of such agency, or to the Federal Bureau of Investigation on behalf of and upon written request by the President or such head, return information with respect to an individual who is designated as being under consideration for appointment to a position in the executive or judicial branch of the Federal Government. Such return information shall be limited to whether such individual -
  - (A) has filed returns with respect to the taxes imposed under chapter 1 for not more than the immediately preceding 3 years;
  - (B) has failed to pay any tax within 10 days after notice and demand, or has been assessed any penalty under this title for negligence, in the current year or immediately preceding 3 years;
  - (C) has been or is under investigation for possible criminal offenses under the internal revenue laws and the results of any such investigation; or
  - (D) has been assessed any civil penalty under this title for fraud.

    Within 3 days of the receipt of any request for any return information with respect to any individual under this paragraph, the Secretary shall notify such individual in writing that such information has been requested under the provisions of this paragraph.
- (3) Restriction on disclosure
  The employees to whom returns and return information are disclosed under this subsection shall not disclose such returns and return information to any other person except the President or the head of such agency without the personal written direction of the President or the head of such agency.
- (4) Restriction on disclosure to certain employees
  Disclosure of returns and return information under this subsection shall not be made to any employee whose annual rate of basic pay is less than the annual rate of basic pay specified for positions subject to section 5316 of title 5, United States Code.
- (5) Reporting requirements
  Within 30 days after the close of each calendar quarter, the President and the head of any agency requesting returns and return information under this subsection shall each file a report with the Joint Committee on Taxation setting forth the taxpayers with respect to whom such requests were made during such quarter under this subsection, the returns or return information involved, and the reasons for such requests. The President shall not be required to report on any request for returns and return information pertaining to an individual who was an officer or

employee of the executive branch of the Federal Government at the time such request was made. Reports filed pursuant to this paragraph shall not be disclosed unless the Joint Committee on Taxation determines that disclosure thereof (including identifying details) would be in the national interest. Such reports shall be maintained by the Joint Committee on Taxation for a period not exceeding 2 years unless, within such period, the Joint Committee on Taxation determines that a disclosure to the Congress is necessary.

- (h) Disclosure to certain Federal officers and employees for purposes of tax administration, etc.
  - (1) Department of the Treasury
    Returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.
  - (2) Department of Justice
    In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, but only if -
    - (A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;
    - (B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or
    - (C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.
  - (3) Form of request
    In any case in which the Secretary is authorized to disclose a return or return information to the Department of Justice pursuant to the provisions of this subsection -
    - (A) if the Secretary has referred the case to the Department of Justice, or if the proceeding is authorized by subchapter B of chapter 76, the Secretary may make such disclosure on his own motion, or
    - (B) if the Secretary receives a written request from the Attorney General, the Deputy Attorney General, or an Assistant

Attorney General for a return of, or return information relating to, a person named in such request and setting forth the need for the disclosure, the Secretary shall disclose return or return the information so requested.

- (4) Disclosure in judicial and administrative tax proceedings
  A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only -
  - (A) the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;
  - (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;
  - (C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or
  - (D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

  However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.
- (5) Prospective jurors
  In connection with any judicial proceeding described in paragraph (4) to which the United States is a party, the Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.
- (6) Withholding of tax from social security benefits
  Upon written request of the payor agency, the Secretary may disclose available return information from the master files of the Internal Revenue Service with respect to the address and

status of an individual as a nonresident alien or as a citizen or resident of the United States to the Social Security Administration or the Railroad Retirement Board (whichever is appropriate) for purposes of carrying out its responsibilities for withholding tax under section 1441 from social security benefits (as defined in section 86(d)).

- (i) Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration
  - (1) Disclosure of returns and return information for use in criminal investigations
    - (A) In general
      Except as provided in paragraph (6), any return or return information with respect to any specified taxable period or periods shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency who are personally and directly engaged in -
- (i) preparation for any judicial or administrative proceeding pertaining to the enforcement of a specifically designated Federal criminal statute (not involving tax administration) to which the United States or such agency is or may be a party,
- (ii) any investigation which may result in such a proceeding, or
- (iii) any Federal grand jury proceeding pertaining to enforcement of such a criminal statute to which the United States or such agency is or may be a party,
solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.
    - (B) Application for order
      The Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, may authorize an application to a Federal district court judge or magistrate for the order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that -
- (i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed,
- (ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter

relating to the commission of such act, and

- (iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act, and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.
    - (2) Disclosure of return information other than taxpayer return information for use in criminal investigations
        - (A) In general
          Except as provided in paragraph (6), upon receipt by the Secretary of a request which meets the requirements of subparagraph (B) from the head of any Federal agency or the Inspector General thereof, or, in the case of the Department of Justice, the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, any United States attorney, any special prosecutor appointed under section 593 of title 28, United States Code, or any attorney in charge of a criminal division organized crime strike force established pursuant to section 510 of title 28, United States Code, the Secretary shall disclose return information (other than taxpayer return information) to officers and employees of such agency who are personally and directly engaged in -
- (i) preparation for any judicial or administrative proceeding described in paragraph (1)(A)(i),
- (ii) any investigation which may result in such a proceeding, or
- (iii) any grand jury proceeding described in paragraph (1)(A)(iii),

  solely for the use of such officers and employees in such preparation, investigation, or grand jury proceeding.
    - (B) Requirements
      A request meets the requirements of this subparagraph if the request is in writing and sets forth -
- (i) the name and address of the taxpayer with respect to whom the requested return information relates;
- (ii) the taxable period or periods to which such return information relates;
- (iii) the statutory authority under which the proceeding or investigation described in subparagraph (A) is being conducted; and
- (iv) the specific reason or reasons why such disclosure is, or may be, relevant to such proceeding or investigation.
    - (C) Taxpayer identity
      For purposes of this paragraph, a taxpayer's identity shall not be treated as taxpayer return information.
        - (3) Disclosure of return information to apprise appropriate

officials of criminal activities or emergency circumstances

- (A) Possible violations of Federal criminal law
- (i) In general
  Except as provided in paragraph (6), the Secretary may disclose in writing return information (other than taxpayer return information) which may constitute evidence of a violation of any Federal criminal law (not involving tax administration) to the extent necessary to apprise the head of the appropriate Federal agency charged with the responsibility of enforcing such law. The head of such agency may disclose such return information to officers and employees of such agency to the extent necessary to enforce such law.
- (ii) Taxpayer identity
  If there is return information (other than taxpayer return information) which may constitute evidence of a violation by any taxpayer of any Federal criminal law (not involving tax administration), such taxpayer's identity may also be disclosed under clause (i).
  - (B) Emergency circumstances
- (i) Danger of death or physical injury
  Under circumstances involving an imminent danger of death or physical injury to any individual, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal or State law enforcement agency of such circumstances.
- (ii) Flight from Federal prosecution
  Under circumstances involving the imminent flight of any individual from Federal prosecution, the Secretary may disclose return information to the extent necessary to apprise appropriate officers or employees of any Federal law enforcement agency of such circumstances.
  - (4) Use of certain disclosed returns and return information in judicial or administrative proceedings
    - (A) Returns and taxpayer return information
      Except as provided in subparagraph (C), any return or taxpayer return information obtained under paragraph (1) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute or related civil forfeiture (not involving tax administration) to which the United States or a Federal agency is a party -
- (i) if the court finds that such return or taxpayer return information is probative of a matter in issue relevant in establishing the commission of a crime or the guilt or liability of a party, or
- (ii) to the extent required by order of the court pursuant to section 3500 of title 18, United States Code, or rule 16

of the Federal Rules of Criminal Procedure.

- (B) Return information (other than taxpayer return information)
  Except as provided in subparagraph (C), any return information (other than taxpayer return information) obtained under paragraph (1), (2), or (3)(A) may be disclosed in any judicial or administrative proceeding pertaining to enforcement of a specifically designated Federal criminal statute or related civil forfeiture (not involving tax administration) to which the United States or a Federal agency is a party.
- (C) Confidential informant; impairment of investigations
  No return or return information shall be admitted into evidence under subparagraph (A)(i) or (B) if the Secretary determines and notifies the Attorney General or his delegate or the head of the Federal agency that such admission would identify a confidential informant or seriously impair a civil or criminal tax investigation.
- (D) Consideration of confidentiality policy
  In ruling upon the admissibility of returns or return information, and in the issuance of an order under subparagraph (A)(ii), the court shall give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.
- (E) Reversible error
  The admission into evidence of any return or return information contrary to the provisions of this paragraph shall not, as such, constitute reversible error upon appeal of a judgment in the proceeding.
    - (5) Disclosure to locate fugitives from justice
- (A) In general
  Except as provided in paragraph (6), the return of an individual or return information with respect to such individual shall, pursuant to and upon the grant of an ex parte order by a Federal district court judge or magistrate under subparagraph (B), be open (but only to the extent necessary as provided in such order) to inspection by, or disclosure to, officers and employees of any Federal agency exclusively for use in locating such individual.
- (B) Application for order
  Any person described in paragraph (1)(B) may authorize an application to a Federal district court judge or magistrate for an order referred to in subparagraph (A). Upon such application, such judge or magistrate may grant such order if he determines on the basis of the facts submitted by the applicant that -

- **(i) a Federal arrest warrant relating to the commission of a Federal felony offense has been issued for an individual who is a fugitive from justice,**
- (ii) the return of such individual or return information

with respect to such individual is sought exclusively for use in locating such individual, and

- (iii) there is reasonable cause to believe that such return or return information may be relevant in determining the location of such individual.
  - (6) Confidential informants; impairment of investigations
    The Secretary shall not disclose any return or return information under paragraph (1), (2), (3)(A), (5), or (7) if the Secretary determines (and, in the case of a request for disclosure pursuant to a court order described in paragraph (1)(B) or (5)(B), certifies to the court) that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation.
  - (7) Comptroller General
    - (A) Returns available for inspection
      Except as provided in subparagraph (C), upon written request by the Comptroller General of the United States, returns and return information shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making -

- (i) an audit of the Internal Revenue Service or the Bureau of Alcohol, Tobacco and Firearms which may be required by section 713 of title 31, United States Code, or
- (ii) any audit authorized by subsection (p)(6),

except that no such officer or employee shall, except to the extent authorized by subsection (f) or (p)(6), disclose to any person, other than another officer or employee of such office whose official duties require such disclosure, any return or return information described in section 4424(a) in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, nor shall such officer or employee disclose any other return or return information, except as otherwise expressly provided by law, to any person other than such other officer or employee of such office in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

- (B) Audits of other agencies

- (i) In general
  Nothing in this section shall prohibit any return or return information obtained under this title by any Federal agency (other than an agency referred to in subparagraph (A)) for use in any program or activity from being open to inspection by, or disclosure to, officers and employees of the General Accounting Office if such inspection or disclosure is -
  - (I) for purposes of, and to the extent necessary in, making an audit authorized by law of such program or activity, and

- (II) pursuant to a written request by the Comptroller General of the United States to the head of such Federal agency.

- (ii) Information from Secretary
If the Comptroller General of the United States determines that the returns or return information available under clause
- (i) are not sufficient for purposes of making an audit of any program or activity of a Federal agency (other than an agency referred to in subparagraph (A)), upon written request by the Comptroller General to the Secretary, returns and return information (of the type authorized by subsection (l) or (m) to be made available to the Federal agency for use in such program or activity) shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making such audit.
- (iii) Requirement of notification upon completion of audit
Within 90 days after the completion of an audit with respect to which returns or return information were opened to inspection or disclosed under clause (i) or (ii), the Comptroller General of the United States shall notify in writing the Joint Committee on Taxation of such completion. Such notice shall include -
  - (I) a description of the use of the returns and return information by the Federal agency involved,
  - (II) such recommendations with respect to the use of returns and return information by such Federal agency as the Comptroller General deems appropriate, and
  - (III) a statement on the impact of any such recommendations on confidentiality of returns and return information and the administration of this title.
- (iv) Certain restrictions made applicable
The restrictions contained in subparagraph (A) on the disclosure of any returns or return information open to inspection or disclosed under such subparagraph shall also apply to returns and return information open to inspection or disclosed under this subparagraph.
  - (C) Disapproval by Joint Committee on Taxation
Returns and return information shall not be open to inspection or disclosed under subparagraph (A) or (B) with respect to an audit -
- (i) unless the Comptroller General of the United States notifies in writing the Joint Committee on Taxation of such audit, and
- (ii) if the Joint Committee on Taxation disapproves such audit by a vote of at least two-thirds of its members within the 30-day period beginning on the day the Joint Committee on Taxation receives such notice.

- (j) Statistical use
  - (1) Department of Commerce
    Upon request in writing by the Secretary of Commerce, the Secretary shall furnish -
    - (A) such returns, or return information reflected thereon, to officers and employees of the Bureau of the Census, and
    - (B) such return information reflected on returns of corporations to officers and employees of the Bureau of Economic Analysis,

    as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law.
  - (2) Federal Trade Commission
    Upon request in writing by the Chairman of the Federal Trade Commission, the Secretary shall furnish such return information reflected on any return of a corporation with respect to the tax imposed by chapter 1 to officers and employees of the Division of Financial Statistics of the Bureau of Economics of such commission as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, administration by such division of legally authorized economic surveys of corporations.
  - (3) Department of Treasury
    Returns and return information shall be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for the purpose of, but only to the extent necessary in, preparing economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities. Such inspection or disclosure shall be permitted only upon written request which sets forth the specific reason or reasons why such inspection or disclosure is necessary and which is signed by the head of the bureau or office of the Department of the Treasury requesting the inspection or disclosure.
  - (4) Anonymous form
    No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.
- (k) Disclosure of certain returns and return information for tax administration purposes
  - (1) Disclosure of accepted offers-in-compromise
    Return information shall be disclosed to members of the general public to the extent necessary to permit inspection of any accepted offer-in-compromise under section 7122 relating to the liability for a tax imposed by this title.

- (2) Disclosure of amount of outstanding lien
  If a notice of lien has been filed pursuant to section 6323(f), the amount of the outstanding obligation secured by such lien may be disclosed to any person who furnishes satisfactory written evidence that he has a right in the property subject to such lien or intends to obtain a right in such property.
- (3) Disclosure of return information to correct misstatements of fact
  The Secretary may, but only following approval by the Joint Committee on Taxation, disclose such return information or any other information with respect to any specific taxpayer to the extent necessary for tax administration purposes to correct a misstatement of fact published or disclosed with respect to such taxpayer's return or any transaction of the taxpayer with the Internal Revenue Service.
- (4) Disclosure of competent authority under income tax convention
  A return or return information may be disclosed to a competent authority of a foreign government which has an income tax or gift and estate tax convention, or other convention or bilateral agreement relating to the exchange of tax information, with the United States but only to the extent provided in, and subject to the terms and conditions of, such convention or bilateral agreement.
- (5) State agencies regulating tax return preparers
  Taxpayer identity information with respect to any income tax return preparer, and information as to whether or not any penalty has been assessed against such income tax return preparer under section 6694, 6695, or 7216, may be furnished to any agency, body, or commission lawfully charged under any State or local law with the licensing, registration, or regulation of income tax return preparers. Such information may be furnished only upon written request by the head of such agency, body, or commission designating the officers or employees to whom such information is to be furnished. Information may be furnished and used under this paragraph only for purposes of the licensing, registration, or regulation of income tax return preparers.
- (6) Disclosure by internal revenue officers and employees for investigative purposes
  An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the

Secretary may prescribe by regulation.

- (7) Disclosure of excise tax registration information
  To the extent the Secretary determines that disclosure is necessary to permit the effective administration of subtitle D, the Secretary may disclose -
  - (A) the name, address, and registration number of each person who is registered under any provision of subtitle D (and, in the case of a registered terminal operator, the address of each terminal operated by such operator), and
  - (B) the registration status of any person.

- (l) Disclosure of returns and return information for purposes other than tax administration
  - (1) Disclosure of certain returns and return information to Social Security Administration and Railroad Retirement Board
    The Secretary may, upon written request, disclose returns and return information with respect to -
    - (A) taxes imposed by chapters 2, 21, and 24, to the Social Security Administration for purposes of its administration of the Social Security Act;
    - (B) a plan to which part I of subchapter D of chapter 1 applies, to the Social Security Administration for purposes of carrying out its responsibility under section 1131 of the Social Security Act, limited, however to return information described in section 6057(d); and
    - (C) taxes imposed by chapter 22, to the Railroad Retirement Board for purposes of its administration of the Railroad Retirement Act.
  - (2) Disclosure of returns and return information to the Department of Labor and Pension Benefit Guaranty Corporation
    The Secretary may, upon written request, furnish returns and return information to the proper officers and employees of the Department of Labor and the Pension Benefit Guaranty Corporation for purposes of, but only to the extent necessary in, the administration of titles I and IV of the Employee Retirement Income Security Act of 1974.
  - (3) Disclosure that applicant for Federal loan has tax delinquent account
    - (A) In general
      Upon written request, the Secretary may disclose to the head of the Federal agency administering any included Federal loan program whether or not an applicant for a loan under such program has a tax delinquent account.
    - (B) Restriction on disclosure
      Any disclosure under subparagraph (A) shall be made only for the purpose of, and to the extent necessary in, determining the creditworthiness of the applicant for the loan in question.
    - (C) Included Federal loan program defined
      For purposes of this paragraph, the term "included Federal

loan program" means any program under which the United States or a Federal agency makes, guarantees, or insures loans.

- (4) Disclosure of returns and return information for use in personnel or claimant representative matters
  The Secretary may disclose returns and return information -
  - (A) upon written request -
- (i) to an employee or former employee of the Department of the Treasury, or to the duly authorized legal representative of such employee or former employee, who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee or former employee; or
- (ii) to any person, or to the duly authorized legal representative of such person, whose rights are or may be affected by an administrative action or proceeding under section 330 of title 31, United States Code,
  solely for use in the action or proceeding, or in preparation for the action or proceeding, but only to the extent that the Secretary determines that such returns or return information is or may be relevant and material to the action or proceeding; or
  - (B) to officers and employees of the Department of the Treasury for use in any action or proceeding described in subparagraph (A), or in preparation for such action or proceeding, to the extent necessary to advance or protect the interests of the United States.
    - (5) Social Security Administration
      Upon written request by the Commissioner of Social Security, the Secretary may disclose information returns filed pursuant to part III of subchapter A of chapter 61 of this subtitle for the purpose of -
  - (A) carrying out, in accordance with an agreement entered into pursuant to section 232 of the Social Security Act, an effective return processing program; or
  - (B) providing information regarding the mortality status of individuals for epidemiological and similar research in accordance with section 1106(d) of the Social Security Act.
    - (6) Disclosure of return information to Federal, State, and local child support enforcement agencies
  - (A) Return information from Internal Revenue Service
    The Secretary may, upon written request, disclose to the appropriate Federal, State, or local child support enforcement agency -
- (i) available return information from the master files of the Internal Revenue Service relating to the social security account number (or numbers, if the individual involved has more than one such number), address, filing status, amounts and nature of income, and the number of dependents reported on any return filed by, or with respect to, any individual with respect to whom child support obligations are sought to

be established or enforced pursuant to the provisions of part D of title IV of the Social Security Act and with respect to any individual to whom such support obligations are owing, and

- (ii) available return information reflected on any return filed by, or with respect to, any individual described in clause (i) relating to the amount of such individual's gross income (as defined in section 61) or consisting of the names and addresses of payors of such income and the names of any dependents reported on such return, but only if such return information is not reasonably available from any other source.
  - (B) Disclosure to certain agents
    The following information disclosed to any child support enforcement agency under subparagraph (A) with respect to any individual with respect to whom child support obligations are sought to be established or enforced may be disclosed by such agency to any agent of such agency which is under contract with such agency to carry out the purposes described in subparagraph (C):
- (i) The address and social security account number (or numbers) of such individual.
- (ii) The amount of any reduction under section 6402(c) (relating to offset of past-due support against overpayments) in any overpayment otherwise payable to such individual.
  - (C) Restriction on disclosure
    Information may be disclosed under this paragraph only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations.
    - (7) Disclosure of return information to Federal, State, and local agencies administering certain programs under the Social Security Act, the Food Stamp Act of 1977, or title 38, United States Code, or certain housing assistance programs
  - (A) Return information from Social Security Administration
    The Commissioner of Social Security shall, upon written request, disclose return information from returns with respect to net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income, which have been disclosed to the Social Security Administration as provided by paragraph (1) or
    - (5) of this subsection, to any Federal, State, or local agency administering a program listed in subparagraph (D).
  - (B) Return information from Internal Revenue Service
    The Secretary shall, upon written request, disclose current return information from returns with respect to unearned income from the Internal Revenue Service files to any Federal, State, or local agency administering a program listed in subparagraph

(D).

- (C) Restriction on disclosure
  The Commissioner of Social Security and the Secretary shall disclose return information under subparagraphs (A) and (B) only for purposes of, and to the extent necessary in, determining eligibility for, or the correct amount of, benefits under a program listed in subparagraph (D).
- (D) Programs to which rule applies
  The programs to which this paragraph applies are:

- (i) a State program funded under part A of title IV of the Social Security Act;
- (ii) medical assistance provided under a State plan approved under title XIX of the Social Security Act;
- (iii) supplemental security income benefits provided under title XVI of the Social Security Act, and federally administered supplementary payments of the type described in section 1616(a) of such Act (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);
- (iv) any benefits provided under a State plan approved under title I, X, XIV, or XVI of the Social Security Act (as those titles apply to Puerto Rico, Guam, and the Virgin Islands);
- (v) unemployment compensation provided under a State law described in section 3304 of this title;
- (vi) assistance provided under the Food Stamp Act of 1977;
- (vii) State-administered supplementary payments of the type described in section 1616(a) of the Social Security Act (including payments pursuant to an agreement entered into under section 212(a) of Public Law 93-66);
- (viii)
  - (I) any needs-based pension provided under chapter 15 of title 38, United States Code, or under any other law administered by the Secretary of Veterans Affairs;
  - (II) parents' dependency and indemnity compensation provided under section 1315 of title 38, United States Code;
  - (III) health-care services furnished under section 1710(a)(1)(I), 1710(a)(2), 1710(b), and 1712(a)(2)(B) of such title; and
  - (IV) compensation paid under chapter 11 of title 38, United States Code, at the 100 percent rate based solely on unemployability and without regard to the fact that the disability or disabilities are not rated as 100 percent disabling under the rating schedule; and
- (ix) any housing assistance program administered by the Department of Housing and Urban Development that involves initial and periodic review of an applicant's or participant's income, except that return information may be

disclosed under this clause only on written request by the Secretary of Housing and Urban Development and only for use by officers and employees of the Department of Housing and Urban Development with respect to applicants for and participants in such programs.
Only return information from returns with respect to net earnings from self-employment and wages may be disclosed under this paragraph for use with respect to any program described in clause (viii)(IV). Clause (viii) shall not apply after September 30, 1998. Clause (ix) shall not apply after September 30, 1998.

- (8) Disclosure of certain return information by Social Security Administration to State and local child support enforcement agencies
  - (A) In general
    Upon written request, the Commissioner of Social Security shall disclose directly to officers and employees of a State or local child support enforcement agency return information from returns with respect to social security account numbers, net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5) of this subsection.
  - (B) Restriction on disclosure
    The Commissioner of Social Security shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, establishing and collecting child support obligations from, and locating, individuals owing such obligations. For purposes of the preceding sentence, the term "child support obligations" only includes obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under part D of title IV of such Act.
  - (C) State or local child support enforcement agency
    For purposes of this paragraph, the term "State or local child support enforcement agency" means any agency of a State or political subdivision thereof operating pursuant to a plan described in subparagraph (B).
- (9) Disclosure of alcohol fuel producers to administrators of State alcohol laws
  Notwithstanding any other provision of this section, the Secretary may disclose -
  - (A) the name and address of any person who is qualified to produce alcohol for fuel use under section 5181, and
  - (B) the location of any premises to be used by such person in producing alcohol for fuel,

to any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for administration of State alcohol laws solely for use in the administration of such laws.

- (10) Disclosure of certain information to agencies requesting a reduction under section 6402(c) or 6402(d)
  - (A) Return information from Internal Revenue Service
    The Secretary may, upon receiving a written request, disclose to officers and employees of any agency seeking a reduction under subsection (c), (d), or (e) of section 6402 and to officers and employees of the Department of the Treasury in connection with such reduction -
- (i) taxpayer identity information with respect to the taxpayer against whom such a reduction was made or not made and with respect to any other person filing a joint return with such taxpayer,
- (ii) the fact that a reduction has been made or has not been made under such subsection with respect to such taxpayer,
- (iii) the amount of such reduction,
- (iv) whether such taxpayer filed a joint return, and
- (v) the fact that a payment was made (and the amount of the payment) to the spouse of the taxpayer on the basis of a joint return.
  - (B) Restriction on use of disclosed information
    Any officers and employees of an agency receiving return information under subparagraph (A) shall use such information only for the purposes of, and to the extent necessary in, establishing appropriate agency records, locating any person with respect to whom a reduction under subsection (c), (d), or
    - (e) of section 6402 is sought for purposes of collecting the debt with respect to which the reduction is sought, or in the defense of any litigation or administrative procedure ensuing from a reduction made under subsection (c), (d), or (e) of section 6402. Any return information disclosed with respect to section 6402(e) shall only be disclosed to officers and employees of the State agency requesting such information.
      - (11) Disclosure of return information to carry out Federal Employees' Retirement System
  - (A) In general
    The Commissioner of Social Security shall, on written request, disclose to the Office of Personnel Management return information from returns with respect to net earnings from self-employment (as defined in section 1402), wages (as defined in section 3121(a) or 3401(a)), and payments of retirement income, which have been disclosed to the Social Security Administration as provided by paragraph (1) or (5).
  - (B) Restriction on disclosure

The Commissioner of Social Security shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, the administration of chapters 83 and 84 of title 5, United States Code.

- (12) Disclosure of certain taxpayer identity information for verification of employment status of medicare beneficiary and spouse of medicare beneficiary
  - (A) Return information from Internal Revenue Service
    The Secretary shall, upon written request from the Commissioner of Social Security, disclose to the Commissioner available filing status and taxpayer identity information from the individual master files of the Internal Revenue Service relating to whether any medicare beneficiary identified by the Commissioner was a married individual (as defined in section 7703) for any specified year after 1986, and, if so, the name of the spouse of such individual and such spouse's TIN.
  - (B) Return information from Social Security Administration
    The Commissioner of Social Security shall, upon written request from the Administrator of the Health Care Financing Administration, disclose to the Administrator the following information:
    - (i) The name and TIN of each medicare beneficiary who is identified as having received wages (as defined in section 3401(a)), above an amount (if any) specified by the Secretary of Health and Human Services, from a qualified employer in a previous year.
    - (ii) For each medicare beneficiary who was identified as married under subparagraph (A) and whose spouse is identified as having received wages, above an amount (if any) specified by the Secretary of Health and Human Services, from a qualified employer in a previous year -
      - (I) the name and TIN of the medicare beneficiary, and
      - (II) the name and TIN of the spouse.
    - (iii) With respect to each such qualified employer, the name, address, and TIN of the employer and the number of individuals with respect to whom written statements were furnished under section 6051 by the employer with respect to such previous year.
  - (C) Disclosure by Health Care Financing Administration
    With respect to the information disclosed under subparagraph (B), the Administrator of the Health Care Financing Administration may disclose -
    - (i) to the qualified employer referred to in such subparagraph the name and TIN of each individual identified under such subparagraph as having received wages from the employer (hereinafter in this subparagraph referred to as the "employee") for purposes of determining during what period such employee or the employee's spouse may be (or have been)

covered under a group health plan of the employer and what benefits are or were covered under the plan (including the name, address, and identifying number of the plan),

- (ii) to any group health plan which provides or provided coverage to such an employee or spouse, the name of such employee and the employee's spouse (if the spouse is a medicare beneficiary) and the name and address of the employer, and, for the purpose of presenting a claim to the plan -
  - (I) the TIN of such employee if benefits were paid under title XVIII of the Social Security Act with respect to the employee during a period in which the plan was a primary plan (as defined in section 1862(b)(2)(A) of the Social Security Act), and
  - (II) the TIN of such spouse if benefits were paid under such title with respect to the spouse during such period, and
- (iii) to any agent of such Administrator the information referred to in subparagraph (B) for purposes of carrying out clauses (i) and (ii) on behalf of such Administrator.
  - (D) Special rules
- (i) Restrictions on disclosure
  Information may be disclosed under this paragraph only for purposes of, and to the extent necessary in, determining the extent to which any medicare beneficiary is covered under any group health plan.
- (ii) Timely response to requests
  Any request made under subparagraph (A) or (B) shall be complied with as soon as possible but in no event later than 120 days after the date the request was made.
  - (E) Definitions
    For purposes of this paragraph -
- (i) Medicare beneficiary
  The term "medicare beneficiary" means an individual entitled to benefits under part A, or enrolled under part B, of title XVIII of the Social Security Act, but does not include such an individual enrolled in part A under section 1818.
- (ii) Group health plan
  The term "group health plan" means any group health plan (as defined in section 5000(b)(1)).
- (iii) Qualified employer
  The term "qualified employer" means, for a calendar year, an employer which has furnished written statements under section 6051 with respect to at least 20 individuals for wages paid in the year.
  - (F) Termination
    Subparagraphs (A) and (B) shall not apply to -

- (i) any request made after September 30, 1998, and
- (ii) any request made before such date for information relating to -
  - (I) 1997 or thereafter in the case of subparagraph (A), or
  - (II) 1998 or thereafter in the case of subparagraph (B).
    - (13) Disclosure of return information to carry out income contingent repayment of student loans
  - (A) In general
    The Secretary may, upon written request from the Secretary of Education, disclose to officers and employees of the Department of Education return information with respect to a taxpayer who has received an applicable student loan and whose loan repayment amounts are based in whole or in part on the taxpayer's income. Such return information shall be limited to -
- (i) taxpayer identity information with respect to such taxpayer,
- (ii) the filing status of such taxpayer, and
- (iii) the adjusted gross income of such taxpayer.
  - (B) Restriction on use of disclosed information
    Return information disclosed under subparagraph (A) may be used by officers and employees of the Department of Education only for the purposes of, and to the extent necessary in, establishing the appropriate income contingent repayment amount for an applicable student loan.
  - (C) Applicable student loan
    For purposes of this paragraph, the term "applicable student loan" means -
- (i) any loan made under the program authorized under part D of title IV of the Higher Education Act of 1965, and
- (ii) any loan made under part B or E of title IV of the Higher Education Act of 1965 which is in default and has been assigned to the Department of Education.
  - (D) Termination
    This paragraph shall not apply to any request made after September 30, 1998.
    - (14) Disclosure of return information to United States Customs Service
      The Secretary may, upon written request from the Commissioner of the United States Customs Service, disclose to officers and employees of the Department of the Treasury such return information with respect to taxes imposed by chapters 1 and 6 as the Secretary may prescribe by regulations, solely for the purpose of, and only to the extent necessary in -
  - (A) ascertaining the correctness of any entry in audits as provided for in section 509 of the Tariff Act of 1930 (19 U.S.C. 1509), or

- (B) other actions to recover any loss of revenue, or to collect duties, taxes, and fees, determined to be due and owing pursuant to such audits.
  - (15) Disclosure of returns filed under section 6050I
    The Secretary may, upon written request, disclose to officers and employees of -
- (A) any Federal agency,
- (B) any agency of a State or local government, or
- (C) any agency of the government of a foreign country,

information contained on returns filed under section 6050I. Any such disclosure shall be made on the same basis, and subject to the same conditions, as apply to disclosures of information on reports filed under section 5313 of title 31, United States Code; except that no disclosure under this paragraph shall be made for purposes of the administration of any tax law.

- (m) Disclosure of taxpayer identity information
  - (1) Tax refunds
    The Secretary may disclose taxpayer identity information to the press and other media for purposes of notifying persons entitled to tax refunds when the Secretary, after reasonable effort and lapse of time, has been unable to locate such persons.
  - (2) Federal claims
- (A) In general
  Except as provided in subparagraph (B), the Secretary may, upon written request, disclose the mailing address of a taxpayer for use by officers, employees, or agents of a Federal agency for purposes of locating such taxpayer to collect or compromise a Federal claim against the taxpayer in accordance with sections 3711, 3717, and 3718 of title 31.
- (B) Special rule for consumer reporting agency
  In the case of an agent of a Federal agency which is a consumer reporting agency (within the meaning of section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))), the mailing address of a taxpayer may be disclosed to such agent under subparagraph (A) only for the purpose of allowing such agent to prepare a commercial credit report on the taxpayer for use by such Federal agency in accordance with sections 3711, 3717, and 3718 of title 31.
  - (3) National Institute for Occupational Safety and Health
    Upon written request, the Secretary may disclose the mailing address of taxpayers to officers and employees of the National Institute for Occupational Safety and Health solely for the purpose of locating individuals who are, or may have been, exposed to occupational hazards in order to determine the status of their health or to inform them of the possible need for medical care and treatment.
  - (4) Individuals who owe an overpayment of Federal Pell Grants or who have defaulted on student loans administered by the

Department of Education

- (A) In general
  Upon written request by the Secretary of Education, the Secretary may disclose the mailing address of any taxpayer -
- (i) who owes an overpayment of a grant awarded to such taxpayer under subpart 1 of part A of title IV of the Higher Education Act of 1965, or
- (ii) who has defaulted on a loan -
  - (I) made under part B, D, or E of title IV of the Higher Education Act of 1965, or
  - (II) made pursuant to section 3(a)(1) of the Migration and Refugee Assistance Act of 1962 to a student at an institution of higher education,

  for use only by officers, employees, or agents of the Department of Education for purposes of locating such taxpayer for purposes of collecting such overpayment or loan.
  - (B) Disclosure to educational institutions, etc.
    Any mailing address disclosed under subparagraph (A)(i) may be disclosed by the Secretary of Education to -
- (i) any lender, or any State or nonprofit guarantee agency, which is participating under part B or D of title IV of the Higher Education Act of 1965, or
- (ii) any educational institution with which the Secretary of Education has an agreement under subpart 1 of part A, or part D or E, of title IV of such Act,

  for use only by officers, employees, or agents of such lender, guarantee agency, or institution whose duties relate to the collection of student loans for purposes of locating individuals who have defaulted on student loans made under such loan programs for purposes of collecting such loans.
  - (5) Individuals who have defaulted on student loans administered by the Department of Health and Human Services
    - (A) In general
      Upon written request by the Secretary of Health and Human Services, the Secretary may disclose the mailing address of any taxpayer who has defaulted on a loan made under part C [1] of title VII of the Public Health Service Act or under subpart II of part B of title VIII of such Act, for use only by officers, employees, or agents of the Department of Health and Human Services for purposes of locating such taxpayer for purposes of collecting such loan.
    - (B) Disclosure to schools and eligible lenders
      Any mailing address disclosed under subparagraph (A) may be disclosed by the Secretary of Health and Human Services to -
- (i) any school with which the Secretary of Health and Human Services has an agreement under subpart II [1] of part C of title VII of the Public Health Service Act or subpart II of part B of title VIII of such Act, or

- (ii) any eligible lender (within the meaning of section 737(4) [1] of such Act) participating under subpart I [1] of part C of title VII of such Act,

for use only by officers, employees, or agents of such school or eligible lender whose duties relate to the collection of student loans for purposes of locating individuals who have defaulted on student loans made under such subparts for the purposes of collecting such loans.

- (6) Blood Donor Locator Service
  - (A) In general

    Upon written request pursuant to section 1141 of the Social Security Act, the Secretary shall disclose the mailing address of taxpayers to officers and employees of the Blood Donor Locator Service in the Department of Health and Human Services.
  - (B) Restriction on disclosure

    The Secretary shall disclose return information under subparagraph (A) only for purposes of, and to the extent necessary in, assisting under the Blood Donor Locator Service authorized persons (as defined in section 1141(h)(1) of the Social Security Act) in locating blood donors who, as indicated by donated blood or products derived therefrom or by the history of the subsequent use of such blood or blood products, have or may have the virus for acquired immune deficiency syndrome, in order to inform such donors of the possible need for medical care and treatment.
  - (C) Safeguards

    The Secretary shall destroy all related blood donor records (as defined in section 1141(h)(2) of the Social Security Act) in the possession of the Department of the Treasury upon completion of their use in making the disclosure required under subparagraph (A), so as to make such records undisclosable.
- (7) Social security account statement furnished by Social Security Administration

  Upon written request by the Commissioner of Social Security, the Secretary may disclose the mailing address of any taxpayer who is entitled to receive a social security account statement pursuant to section 1143(c) of the Social Security Act, for use only by officers, employees or agents of the Social Security Administration for purposes of mailing such statement to such taxpayer.
  - (n) Certain other persons

    Pursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person, including any person described in section 7513(a), to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, for purposes of tax administration.

- (o) Disclosure of returns and return information with respect to certain taxes
- (1) Taxes imposed by subtitle E
  Returns and return information with respect to taxes imposed by subtitle E (relating to taxes on alcohol, tobacco, and firearms) shall be open to inspection by or disclosure to officers and employees of a Federal agency whose official duties require such inspection or disclosure.
- (2) Taxes imposed by chapter 35
  Returns and return information with respect to taxes imposed by chapter 35 (relating to taxes on wagering) shall, notwithstanding any other provision of this section, be open to inspection by or disclosure only to such person or persons and for such purpose or purposes as are prescribed by section 4424.
  - (p) Procedure and recordkeeping
- (1) Manner, time, and place of inspections
  Requests for the inspection or disclosure of a return or return information and such inspection or disclosure shall be made in such manner and at such time and place as shall be prescribed by the Secretary.
- (2) Procedure
  - (A) Reproduction of returns
    A reproduction or certified reproduction of a return shall, upon written request, be furnished to any person to whom disclosure or inspection of such return is authorized under this section. A reasonable fee may be prescribed for furnishing such reproduction or certified reproduction.
  - (B) Disclosure of return information
    Return information disclosed to any person under the provisions of this title may be provided in the form of written documents, reproductions of such documents, films or photoimpressions, or electronically produced tapes, disks, or records, or by any other mode or means which the Secretary determines necessary or appropriate. A reasonable fee may be prescribed for furnishing such return information.
  - (C) Use of reproductions
    Any reproduction of any return, document, or other matter made in accordance with this paragraph shall have the same legal status as the original, and any such reproduction shall, if properly authenticated, be admissible in evidence in any judicial or administrative proceeding as if it were the original, whether or not the original is in existence.
- (3) Records of inspection and disclosure
  - (A) System of recordkeeping
    Except as otherwise provided by this paragraph, the Secretary shall maintain a permanent system of standardized records or accountings of all requests for inspection or disclosure of returns and return information (including the reasons for and

dates of such requests) and of returns and return information inspected or disclosed under this section. Notwithstanding the provisions of section 552a(c) of title 5, United States Code, the Secretary shall not be required to maintain a record or accounting of requests for inspection or disclosure of returns and return information, or of returns and return information inspected or disclosed, under the authority of subsections (c),

- () System of recordkeeping
  - () System of recordkeeping
    accountings required to be maintained under this paragraph shall be available for examination by the Joint Committee on Taxation or the Chief of Staff of such joint committee. Such record or accounting shall also be available for examination by such person or persons as may be, but only to the extent, authorized to make such examination under section 552a(c)(3) of
    title 5, United States Code.
  - (B) Report by the Secretary
    The Secretary shall, within 90 days after the close of each calendar year, furnish to the Joint Committee on Taxation a report with respect to, or summary of, the records or accountings described in subparagraph (A) in such form and containing such information as such joint committee or the Chief of Staff of such joint committee may designate. Such report or summary shall not, however, include a record or accounting of any request by the President under subsection (g)
    for, or the disclosure in response to such request of, any return or return information with respect to any individual who, at the time of such request, was an officer or employee of
    the executive branch of the Federal Government. Such report or
    summary, or any part thereof, may be disclosed by such joint committee to such persons and for such purposes as the joint committee may, by record vote of a majority of the members of
    the joint committee, determine.
  - (C) Public report on disclosures
    The Secretary shall, within 90 days after the close of each calendar year, furnish to the Joint Committee on Taxation for disclosure to the public a report with respect to the records or accountings described in subparagraph (A) which -
- (i) provides with respect to each Federal agency, each agency, body, or commission described in subsection (d),
  - () provides with respect to each Federal agency, each the number of -
    - (I) requests for disclosure of returns and return

information,
- (II) instances in which returns and return information were disclosed pursuant to such requests or otherwise,
- (III) taxpayers whose returns, or return information with respect to whom, were disclosed pursuant to such requests, and

- (ii) describes the general purposes for which such requests were made, [2]
  - (4) Safeguards
    Any Federal agency described in subsection (h)(2), (h)(6),
    - () Safeguards
      - () Safeguards
        any agency, body, or commission described in subsection (d),
        - () Safeguards
          condition for receiving returns or return information -
          - (A) establish and maintain, to the satisfaction of the Secretary, a permanent system of standardized records with respect to any request, the reason for such request, and the date of such request made by or of it and any disclosure of return or return information made by or to it;
          - (B) establish and maintain, to the satisfaction of the Secretary, a secure area or place in which such returns or return information shall be stored;
          - (C) restrict, to the satisfaction of the Secretary, access to the returns or return information only to persons whose duties or responsibilities require access and to whom disclosure may be made under the provisions of this title;
          - (D) provide such other safeguards which the Secretary determines (and which he prescribes in regulations) to be necessary or appropriate to protect the confidentiality of the returns or return information;
          - (E) furnish a report to the

Secretary, at such time and containing such information as the Secretary may prescribe, which describes the procedures established and utilized by such agency, body, or commission or the General Accounting Office for ensuring the confidentiality of returns and return information required by this paragraph; and

- (F) upon completion of use of such returns or return information -

- (i) in the case of an agency, body, or commission described in subsection (d), (i)(3)(B)(i), or (l)(6), (7), (8), or (9) return to the Secretary such returns or return information (along with any copies made therefrom) or make such returns or return information undisclosable in any manner and furnish a written report to the Secretary describing such manner,
- (ii) in the case of an agency described in subsections (h)(2), (h)(6), (i)(1), (2), (3), or (5), (j)(1) or (2), or (o)(1),, [3] or the General Accounting Office, either -
  - (I) return to the Secretary such returns or return information (along with any copies made therefrom),
  - (II) otherwise make such returns or return information undisclosable, or
  - (III) to the extent not so returned or made undisclosable, ensure that the conditions of subparagraphs (A), (B), (C), (D), and (E) of this paragraph continue to be met with respect to such returns or return information, and
- (iii) in the case of the Department of Health and Human

Services for purposes of subsection (m)(6), destroy all such return information upon completion of its use in providing the notification for which the information was obtained, so as to make such information undisclosable; except that the conditions of subparagraphs (A), (B), (C), (D), and (E) shall cease to apply with respect to any return or return information if, and to the extent that, such return or return information is disclosed in the course of any judicial or administrative proceeding and made a part of the public record thereof. If the Secretary determines that any such agency, body, or commission or the General Accounting Office has failed to, or does not, meet the requirements of this paragraph, he may, after any proceedings for review established under paragraph (7), take such actions as are necessary to ensure such requirements are met, including refusing to disclose returns or return information to such agency, body, or commission or the General Accounting Office until he determines that such requirements have been or will be met. In the case of any agency which receives any mailing address under paragraph (2), (4), (6), or (7) of subsection (m) and which discloses any such mailing address to any agent or which receives any information under paragraph (6)(A) or (12)(B) of subsection (l) and which discloses any such information to any agent, this paragraph shall apply to such agency and each such agent (except that, in the case of an agent, any report to the Secretary or other action with

respect to the
Secretary shall be made or taken through such agency). For
purposes of applying this paragraph in any case to which
subsection (m)(6) applies, the term "return information"
includes related blood donor records (as defined in section
1141(h)(2) of the Social Security Act).

- (5) Report on procedures and safeguards
  After the close of each calendar year, the Secretary shall
  furnish to each committee described in subsection (f)(1) a report
  which describes the procedures and safeguards established and
  utilized by such agencies, bodies, or commissions and the General
  Accounting Office for ensuring the confidentiality of returns and
  return information as required by this subsection. Such report
  shall also describe instances of deficiencies in, and failure to
  establish or utilize, such procedures.
- (6) Audit of procedures and safeguards
  - (A) Audit by Comptroller General
    The Comptroller General may audit the procedures and
    safeguards established by such agencies, bodies, or commissions
    pursuant to this subsection to determine whether such
    safeguards and procedures meet the requirements of this
    subsection and ensure the confidentiality of returns and return
    information. The Comptroller General shall notify the
    Secretary before any such audit is conducted.
  - (B) Records of inspection and reports by the Comptroller General
    The Comptroller General shall -
- (i) maintain a permanent system of standardized records and

accountings of returns and return information inspected by officers and employees of the General Accounting Office under subsection (i)(7)(A)(ii) and shall, within 90 days after the close of each calendar year, furnish to the Secretary a report with respect to, or summary of, such records or accountings in such form and containing such information as the Secretary may prescribe, and

- (ii) furnish an annual report to each committee described in subsection (f) and to the Secretary setting forth his findings with respect to any audit conducted pursuant to subparagraph (A).

The Secretary may disclose to the Joint Committee any report furnished to him under clause (i).

- (7) Administrative review
  The Secretary shall by regulations prescribe procedures which provide for administrative review of any determination under paragraph (4) that any agency, body, or commission described in subsection (d) has failed to meet the requirements of such paragraph.
- (8) State law requirements
  - (A) Safeguards
    Notwithstanding any other provision of this section, no return or return information shall be disclosed after December 31, 1978, to any officer or employee of any State which requires a taxpayer to attach to, or include in, any State tax return a copy of any portion of his Federal return, or information reflected on such Federal return, unless such State adopts provisions of law which

protect the confidentiality of the copy of the Federal return (or portion thereof) attached to, or the Federal return information reflected on, such State tax return.

- (B) Disclosure of returns or return information in State returns
  Nothing in subparagraph (A) shall be construed to prohibit the disclosure by an officer or employee of any State of any copy of any portion of a Federal return or any information on a Federal return which is required to be attached or included in a State return to another officer or employee of such State (or political subdivision of such State) if such disclosure is specifically authorized by State law.
  - (q) Regulations
    The Secretary is authorized to prescribe such other regulations as are necessary to carry out the provisions of this section.

Footnotes

[1] See References in Text note below.
[2] So in original. The comma probably should be a period.
[3] So in original.

ANNEXE F

GUIDE CANADIEN SUR L'ÉCHANGE DE RENSEIGNEMENTS

Veuillez noter que ce document n'est pas public donc il n'est pas disponible.

ANNEXE G

GUIDE AMÉRICAIN

Office of the Assistant Commissioner (International)

Office of International Programs

Tax Treaty Division

Exchange of Information

A Field Guide

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INTRODUCTION

Background

Due to gradual liberalization and globalization of world economies in the past decade, many countries have removed legislative controls on international investment and relaxed foreign exchange regulations. This relaxation of controls has been accomplished through the negotiation of free trade agreements such as the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA). While these agreements have benefited world financial markets, they have also increased the risk of tax avoidance/evasion through international transactions. Therefore, due to the tax implication of these international activities, many countries have signed Tax Treaties or Tax Information Exchange Agreements (TIEA) to provide for an exchange of information in an effort to facilitate tax administration in their respective countries.

Exchange of information is essential for the application of tax treaties or TIEAs to ensure correct application of domestic tax laws. The exchange of information Article in tax treaties clearly states whether exchanges are for both the carrying out of the provisions in the convention and/or the domestic laws of the Contracting States.

The goal and purpose of this Guide is to provide an overview of how the exchange of information provisions in the various tax Conventions are administered by the member states in the Organization for Economic Cooperation and Development (OECD).

The key role of field personnel in the exchange of information process

Exchange of information allows the Competent Authorities of the contracting States to request or provide information necessary for a correct application of tax treaties and to combat tax avoidance and evasion as it relates to the implementation of domestic tax laws covered by the Conventions. Field personnel in Contracting States play a key role in this exchange of information process since it is they who initially decide what information to request and when. They also have, in most countries, the duty to collect the information requested by a treaty partner according to the instructions of the designated Competent Authority. Finally, it is field personnel who must also recognize when information may be useful to a treaty partner and thus provide it on a spontaneous basis through the Competent Authority.

It is important that an exchange of information be processed timely due to statute of limitation implications. The information is of no value if the treaty partner can no longer open the tax years concerned. Timely information is useful information that may lead to feedback from the treaty partner that the information received generated tax adjustments. Reciprocity plays an important part in exchange of information and a country receiving useful information is more likely to provide equally useful information.

Legal basis for exchange of information

There are a number of international legal instruments that form the basis for exchange of tax information:

- Bilateral tax conventions, based on the Organization for Economic Cooperation and Development (OECD) Model Convention on Income and Capital - Article 26, The Exchange of Information; or the United Nations Model Double Taxation Convention between Developed and Developing Countries;

- International instruments designed specifically for administrative assistance purposes whether bilateral (Tax Information Exchange Agreements/TIEAs or multilateral (Nordic Convention on Mutual Assistance; the European Community Directive on Mutual Assistance; the Council of Europe/OECD Convention on Mutual Assistance).

The legal instruments through which the United States exchanges information are TIEAs or tax treaties with individual countries based on the U.S. Model Income Tax Convention, currently the September 1996 revision (see Exhibit I for a list of tax conventions and exchange of information agreements).

The authority to exchange information

Direct contacts with foreign tax officials are not allowed unless a delegation of powers is specifically provided. Exchange of information is handled by the Competent Authorities. The treaty partners nominate their own respective Competent Authorities (in the U.S., the Secretary of the Treasury or his representative, the Commissioner of the Internal Revenue Service). The Commissioner has redelegated Competent Authority duties to the Assistant Commissioner (International).

Assistance in criminal tax cases

While the language in the exchange provisions in the conventions does not preclude an exchange of information in possible criminal offenses against the tax laws of a contracting state, there may be additional legal instruments through which an exchange of information is possible when an inquiry or investigation has criminal aspects. For example, in the United States, the Department of Justice (DOJ) can obtain foreign evidence and other types of assistance for criminal tax cases through Mutual Legal Assistance Treaties (MLATs). These treaties, which are concluded in conjunction with the United States Department of State, also provide for assistance under foreign statutes where no formal treaty relationship exists. Accordingly, Contracting States personnel initiating a request for information should inform their respective Competent Authorities of the possible criminal tax aspects of an inquiry or investigation. The basis under which the information will be sought will then be determined by the Competent Authority.

Assistance in tax collection

The OECD Model Tax Convention does not provide for assistance in tax collection by the Competent Authorities on behalf of the other Contracting State. However, some bilateral and/or multilateral conventions do provide that type of tax collection assistance (e.g., Nordic Convention and the Council of Europe/OECD Convention on Mutual Assistance in Tax Matters). Information assisting the Contracting States in collection of domestic taxes covered by the Convention may be exchanged pursuant to Article 26. In the United States, provisions in tax conventions of only five countries provide for assistance in tax collection (Canada, Denmark, France, the Netherlands and Sweden).

IMPLEMENTATION ASPECTS OF EXCHANGE OF INFORMATION

Scope of exchange of information

Examples of the scope of Article 26 are found in the Commentary in Article 26 of the OECD Model Tax Convention (Exhibit II). For example, for the application of Article 12 of the Convention (Royalty Payments), the country of residence may ask the source country the amount of royalties transmitted to one of is residents. The source country may ask the country of the recipient of the royalties whether he is a resident and whether he is the beneficial owner of the royalties in order to be exempt from withholding. Information may also be needed for the proper allocation of profits between associated enterprises in different States or between a head office in one State and a permanent establishment in another State.

In another example, the exchange of information for the application of domestic laws regarding taxes covered by the Convention may be a request for information that includes but is not limited to:

- the fiscal residence on an individual or a company;
- the tax status of a legal entity;
- the nature of income in the source country;
- the income and expenses shown on a tax return;
- business records to determine the amount of commissions paid to a company in another State;
- bank records;
- the price paid for goods in a transaction between independent companies in both States: and
- information in a case of a 'triangular' situation where transactions between two companies, each situated in a Contracting State, and a company in a third State C (where both States A and B have no treaty) which may be a possible tax haven country. In this case, States A and B may exchange information regarding transactions with the company in State C.

Taxpayers covered

Exchange of information is not limited to residents of the Contracting States. Often, the tax administration of one State will have an interest in receiving information on activities carried on in the other State by a particular third country resident because taxation of the latter as a non-resident taxpayer is at issue. However, there may be situations where a Contracting State could have an interest in information about a third country resident who is not a taxpayer in either of the Contracting States; for example, when this information is relevant to the taxation of a third party who is a taxpayer/resident of the requesting State.

Taxes covered

The exchange of information can only concern the taxes covered by the Convention. Therefore, where the Convention applies to taxes on income and capital only, no exchange under the Convention may concern value added or sales taxes or social security contributions. It is important to note, however, that some bilateral tax conventions negotiated by the United States, such as conventions with Mexico and Canada, **do provide** for exchange of information on taxes other than income and capital (e.g.; value added, sales, etc.).

Tax years covered

Time periods in which tax returns may be examined vary from country to country and the beginning of a taxpayer's tax year may not always coincide with the calendar year or a particular fiscal year; see Exhibits III and IV.

Obligation to exchange information

The member states of the OECD Model Convention have agreed that Article 26 implies an obligation to provide an exchange of information, as long as the provisions in the Convention are not contrary to their respective domestic laws.

This obligation takes the form of a 'formal request' from the requesting country Competent Authority; see Exhibit V. The respondent State gathers the information that the requesting State needs in the same manner as they would gather information in their own domestic audit situations. This may include, but is not limited to special investigations. information requests from third-party sources and/or on site examinations of the business accounts as maintained by the taxpayer.

Limitations to exchange of information

Article 26 outlines three situations where Contracting States may not feel obligated to exchange information:

- if the request is at variance with the laws or practice of the Contracting State, (e.g., to supply items of information that are not obtainable under the law in the normal course of administration of the Contracting State);

- if there is a risk of disclosure of business and professional trade secrets; and

- in cases where disclosure of information would be contrary to public policy.

Basis for implementation of exchange of information

The information requested may already be at the disposal of the tax administration of the Contracting State or may require such methods as special investigation, tax examination and/or third-party contacts as noted above. The basis for tax administration is written in each State's fiscal codes and/or tax laws.

In the United States, the Internal Revenue Code (IRC) allows the Internal Revenue Service to administer and carry out its' tax laws. The disclosure provisions are governed by IRC Section 6103, Confidentiality and Disclosure of Return and Return Information. Penalties for unauthorized disclosures are governed by IRC Section 7431, Civil Damages for Unauthorized Disclosure of Returns and Return Information. However, information and actual procedures to carry out tax administration are contained in the Internal Revenue Manual (IRM). Information and procedures on the Exchange of Information Program are outlined specifically in IRM Section 42(10)0, International Enforcement Program. Several IRM sections provide information and outline procedures for requests from both IRS districts and Contracting States' as follows:

42(10)9.1	Examination Requests
42(10)9.2	Assistant Commissioner (International) Services
42(10)(10)	International Requests for Information
42(10)(10).1	U.S. Competent Authority
42(10)(10).3	Office of the Assistant Commissioner (International)
42(10)(10).5	Exchange of Information Program - General
42(10)(10).6	Specific Requests
42(10)(10).61	U.S. Initiated Requests
42(10)(10).62	Foreign Initiated Requests

In addition, on a day to day basis, Program Analysts on the Exchange of Information Team (EIT) as well as Revenue Service Representatives located in various Posts around the world process both U.S. and foreign initiated exchange requests.

Tax Identification Numbers

Most OECD member countries assign Tax Identification Numbers (TINs) to their taxpayers. These TINs are used to identify taxpayers and are essential to automated matching programs. The use of TINs therefore, is crucial for processing information received from a treaty partner. In addition, TINs are also important when either making a request, responding to a request, or providing information spontaneously, since it allows identification of the taxpayer quickly to help facilitate information gathering, or use information received. Consequently, Contracting States should provide TINs where possible (for both source country and residence country when known).

In the United States, the official TIN is known as the Social Security Number (SSN). Individual taxpayers are assigned nine digit numbers (xxx-xx-xxxx) by the Social Security Administration. The IRS issues corporate taxpayers and other business organizations (including non-profit organizations) eleven digit (xx-xxxxxxxxx) Employer Identification Numbers (EIN).

Secrecy provisions

Ordinary tax secrecy protects trade and business secrecy in all countries. Therefore, tax secrecy is the basis for mutual trust and a condition for cooperation between countries. In order to ensure confidentiality of taxpayer and/or tax return information, procedures must be followed to prevent unauthorized disclosure where information may possibly be misused or used for purposes other than tax administration. Information must be kept secret in the same way as information obtained from domestic sources. Sanctions for the violation of such secrecy in Contracting States are governed by the administrative and general laws of that State (e.g.; the IRC as noted above in the case of the United States).

The Competent Authority will determine whether or not to pass on sensitive information. It should be noted however, in some OECD member States, neither the taxpayer and/or third party are allowed to refuse to give information to its tax administration. In the United States, taxpayers **may exercise** their rig: to refuse to disclose information. In the case of a summons, however, the Internal Revenue Service may exercise the Government's right to enforce the summons.

Bank secrecy

In most countries, bank and similar institutions are bound by confidentiality and secrecy regulations. However, tax administration in some countries, have the statutory power to override that confidentiality to obtain specific information for tax purposes. Some countries use this power with reserve, while banks in other countries report information automatically to tax authorities. In the United States, the IRS has the statutory power to obtain specific information from bank/credit institutions for tax purposes provided that the information is detailed in an Administrative Summons. Specific details include but are not limited to the following:

- purpose of summons (e.g.; (Contracting State name) income tax liability of .....);
- name and address of taxpayer;
- tax period(s) covered;
- type of tax (e.g.; Income, value added, etc.);
- authority under which information is requested (e.g. Tax Treaty);
- account number; and
- specific information required (e.g.; signature cards, bank statements, deposit slips, etc.).

With respect to summonses used to secure information in accordance with a foreign initiated request for information, the summons is reviewed and approved by the Associate Chief Counsel

(International) prior to issuance.

Other limitations to exchange of information

Some countries are under the legal obligation to notify the taxpayer named in the exchange request when the tax authorities are about to respond to the request. In the United States, notification to the taxpayer is required where an Administrative Summons is used to obtain information. This notification affords the taxpayer the right to "quash" the summons as noted above. It should be noted that in some countries, in the case of fraud, there is no obligation to notify taxpayers. Also in other countries the notification is postponed until after the exchange of information has been made. In the United States, the taxpayer will not receive notification if it is perceived that the notice will jeopardize the investigation of the case (e.g.; the taxpayer may flee the country to avoid being served with a summons). The Competent Authority should therefore, be aware if notification may have a detrimental effect on the investigation.

It is normal practice in many countries that require banks to supply information only in situations where it is known to tax authorities that a taxpayer has an account with that bank. This implies that general investigations of banks to obtain information about their clients (i.e.; "fishing expeditions") are not permitted and that examination of business accounts maintained by banks may not be used for that purpose. In some cases, bank secrecy laws discourage the request for information from banks by tax authorities even where it is known that the taxpayer has an account at a specific bank. For that reason, the ability to obtain bank information from some countries may be extremely limited.

Disclosure of information received

The information obtained may be disclosed only to persons or authorities involved in the assessment, collection and enforcement of the taxes covered by the Convention (including the prosecution or the determination of appeals) and the information may be used only for such purposes. The information received by the local authorities through the Competent Authorities must be kept confidential. If the secrecy provisions under the domestic laws of a Contracting State are narrower than under the Convention, then the provisions of the Convention will have no consequences. If the domestic rules are broader, however, then the treaty provision will put a restriction on the use of information received from abroad. The local tax authorities are under the obligation to refer to their Competent Authority any issue which may arise concerning the use or disclosure of the information received.

Use of information for other purposes

The information exchanged may not be used for purposes other than those for the tax purpose which gave rise to the information being exchanged. For instance, in countries outside the European Union where the Directive on Mutual Assistance allows the exchange of information on direct taxes and VAT, the information exchanged cannot be used to reassess VAT

if the Article on Exchange of Information in the Convention only covers taxes on income and capital. It cannot be used for non tax purposes. When in doubt about the possibility of using foreign source information, consult the Competent Authority.

In some cases, foreign tax authorities are able to reassess not only income taxes, but also Value Added Tax and import taxes. Several treaties include provisions for the exchange of information for income tax and also VAT purposes. However, when the information that has been requested from a tax authority is also needed to reassess import taxes, the individual making the request should report that situation to the Competent Authority. In such cases, the Competent Authority should request the information from a foreign customs authority in accordance with the provisions of mutual assistance agreements for custom's purposes.

PRACTICAL ASPECTS OF EXCHANGE OF INFORMATION

The purpose of this section is to review a number of practical questions and to offer suggestions for facilitating and expediting the exchange of information process as well as improving the quality of the information exchanged.

Types of exchanges of information

The three main types of exchanges of information are specific, routine and spontaneous.

Specific exchange of information

Specific exchanges involve specific questions relating to a particular case which is currently under examination/investigation.

Routine exchange of information

Routine exchanges involve multiple cases. Typically, these exchanges involve the systematic sending of information concerning specified items of income (interest, dividends, royalties, pensions etc.). The aim of the Contracting States would be to exchange the information in the most efficient way possible, due largely to its volume. The OECD has designed a standard form and format for routine exchanges of information which have proved to be quite useful in processing the information received.

In the United States, information routinely exchanged to treaty partners is obtained from Forms 1042S. These forms are filed with the Philadelphia Service Center on a yearly basis by United States persons that make payments to foreign residents with United States source income.

Spontaneous exchange of information

Information spontaneously exchanged will often be very useful because it concerns information detected and/or selected by a tax official of the supplying State during an audit or investigation. Information is spontaneously exchanged when one of the Contracting States provides this information without it being requested by the other State.

The effectiveness of a spontaneous exchange of information will largely depend on the ability of tax investigators to identify information that may be relevant for a foreign tax administration. A spontaneous exchange requires extra work for the tax investigator without an initial guarantee that the findings are actually going to be relevant for tax purposes. For this reason, it is advisable to concentrate on information which seems promising, for example, because of its general importance or because of the amount of tax involved. Tax investigators should request feedback from the recipient tax administration since it may lead to an adjustment for them. For instance, a foreign tax administration that might provide information relating to

commission fees which were alleged to be paid to one of its residents may actually find that no commission fees were paid and further, it may report to its counterpart which supplied the information the facts of the alleged payment. As a result, the deduction of the commission fees would be denied and the taxable income adjusted accordingly. Other examples of spontaneous exchanges concern fraudulent schemes and payments made to residents.

Other forms of exchange

There are also other forms of exchange besides the traditional ones described above, they are:

Industry-wide exchange of information

An industry-wide exchange of information does not concern a specific taxpayer but an economic sector as a whole, for instance, the pharmaceutical industry or the oil industry. Treaty partners or their representatives meet to discuss the way a particular economic sector operates, the financing schemes, the way prices are determined, the tax evasion trends identified, etc.

Simultaneous tax examinations

A simultaneous tax examination may be defined as an arrangement by two or more countries to examine simultaneously and independently, each on its own territory, the tax affairs of (a) taxpayer(s) in which they have a common or related interest with a view to exchanging any relevant information which they so obtain. The existing differences in statutes of limitations of countries that are member of the OECD are a major obstacle for the selection of cases. Such examinations are particularly useful in the area of transfer pricing and in identifying tax evasion schemes involving tax havens.

Visit of authorized representatives of the competent authorities

A visit to a foreign jurisdiction may be useful to gather information. However, this visit has to be authorized by the foreign jurisdiction, otherwise it would represent a breach of sovereignty. The tax officials must also be authorized representatives of the Competent Authority. This presence abroad may occur in different instances. It may be at the request of the country seeking information, if it is believed it will facilitate the understanding of the request and the gathering of information. It may be at the initiative of the requesting tax administration to reduce the burden of gathering information. In a limited number of countries, authorized representatives of the Competent Authority of the other country may participate in a tax examination. This is often of great value to ascertain a clear picture of business and other relations a resident of a country may have with foreign associates.

Some countries do not allow foreign tax officials to visit their taxpayers in order to gather information for tax or any other purpose. Before requesting permission for a foreign visit, be

sure to ascertain whether or not the foreign country allows foreign tax officials to visit officially.

Sending a request for information to a treaty partner

A request for a specific exchange of information will usually be presented only after every effort has first been made through regular domestic administrative means to obtain the information in the requesting country.

Form of the request

The request must be made in writing, but an oral request may be acceptable if it is later confirmed in writing.

Content of the request

Constructing the request in a complete and comprehensive manner is very important. The request should be as detailed as necessary and contain all the relevant facts. so that the Competent Authority of the receiving State is well aware of the needs of the requestor and can deal with the request in the most efficient manner. An incomplete request will increase delays since the foreign Competent Authority may have to ask for more details to properly respond to the request.

Checklist of what may be included in a request: (note that exchanges should not be delayed by endeavoring to obtain every item on the checklist)

- the reference to the relevant article of the relevant treaty;
- if there are doubts as to the relevant legal basis, refer the matter to the Competent Authority;
- the name, date of birth if known (in case of individuals), Tax Identification Number and addresses of the taxpayer being examined;
- the name, Tax Identification Number (if known) and addresses of the foreign taxpayer or entity involved in the request, the registration number of the legal entity involved (if known);
- the connection between all entities involved (diagrams should be included wherever possible);
- relevant background information;
- types of taxes involved;
- the tax periods under examination (day, month, year they begin and end);
- the tax periods for which information is requested (if different from the years examined, give the reasons why);
- the information requested (indicate whether a trade or business secret is involved)
- if the information involves a payment via an intermediary, indicate the name of the intermediary;

- the tax purpose of the request (the legal issue or the factual issue involved, whether the information is required for the application of the tax treaty or the domestic legislation);
- the name and address of the bank branch as well as the bank account number when bank information is requested;
- the currency involved whenever figures are mentioned;
- the urgency of the reply (including the date after which the information may no longer be used);
- whether a translation should be provided, if possible (in urgent cases, mentioning that no translation is required, may expedite the exchange);
- the stage of the procedure in the requesting State, etc.;
- all other information considered pertinent (invoices, contracts, etc.);
- the name and phone number of the tax official who may be contacted if needed;
- if copies of documents or bank records are requested, what type of authentication is necessary, if any;
- if the information is likely to be used in court in a certain form, that form should be indicated to the treaty partner; and
- indicate if it is a case where the taxpayer should not be alerted or notified since it may endanger the investigation and the reasons for it (for instance in a case of fraud).

Note: Abbreviations should not be used.

If the country receiving the request has established a checklist (as it is for instance in the United States), it is advisable to follow that checklist. The initiator of a specific request should take care to be as complete and as accurate as is possible. The timeliness and completeness of response is largely dependent upon what is received to consider. At a minimum, the name of the taxpayer, type of tax, year(s) under examination to include a statement to that effect, the specific information requested and the relevancy of that information to the examination should all be included.

Language

The request should be drafted in a simple and clear manner, in the native language and accompanied if possible with a translation into the language of the receiving State. The translation should be left to the Competent Authority if the foreign language skills are not sufficient at the local level. Special problems involve the translation of attached documents such as agreements, business correspondence, invoices, etc. If no translation is provided, the relevant elements should be identified, so that the receiving State does not waste time translating information which is irrelevant to answer the request.

General Procedure

The request should be forwarded to the Competent Authority through the normal official channels. See Exhibit VII to determine the exact address depending on the country where the information is to be obtained. The Competent Authority will address the request to the foreign Competent Authority after reviewing the request for accuracy and completeness. See Exhibit V for an example of a Competent Authority letter transmitting the District request. It should be pointed out that the transmittal letter is prepared by the Competent Authority or his/her delegatee (i.e.; RSR) not the district office.

When to expect a reply

The rapidity of the reply will depend on whether the information is available in the tax files or if it requires an investigation. There is no set rule, but certain countries have set internal time frames to answer requests from treaty partners. For instance, some countries have agreed to a Code of Good Practice for exchanges of information on Multi-National Examinations which recommends a maximum of 3 months to answer requests involving law and practice or information contained in the tax administration's own records and 6 months otherwise. A reminder will be sent if no response is received and the Competent Authority deems it necessary.

Use of information received

The information received is to be used only for the purposes allowed by the bilateral tax convention or by the multilateral instrument under which the request was presented. Although in most countries, the taxpayer has a right to be informed of the basis for any adjustment, particularly one increasing the tax liability, there are circumstances under which the original document containing the foreign source information should not be shown to the taxpayer. Accordingly, the Competent Authority should be consulted before any original documents obtained through an exchange of information are disclosed to the taxpayer. In no instance is the actual Competent Authority letter transmitting the district request to be disclosed.

Responding to a request for information initiated by a foreign treaty partner

As indicated previously, the vehicle for requesting information has been negotiated between the United States and the treaty partner and has been ratified by Congress, and further, exists in the form of a Tax Treaty and/or Tax Information Exchange Agreement (TIEA). As such, and to maintain the United States's leadership role in this important program area, it is absolutely imperative that all reasonable efforts be made to secure the foreign requested information as expeditiously and completely as is possible. To that end, the action office responsible for securing the information should consider their involvement in the response process to be one of their highest priorities. Any summons activity, all of which are reviewed by the Associate Chief Counsel (International), should be pursued in an effective and efficient manner. Any delays or unusual difficulties arising during the information securing process

should be communicated to the applicable RSR or Treaty analyst so as to keep them informed of the progress of the case.

Interim response

As far as possible, the Competent Authorities should acknowledge receipt of the request and if possible, provide an estimate of the time needed to respond to the request. In those rare instances where partial responses are appropriate, due consideration should be made to providing an interim response.

Role of the Competent Authority: determining acceptability of the request; provide instructions to field officials

Upon receiving a foreign request, the Competent Authority will determine whether or not the request is acceptable. Items to consider include the following:

- whether it fulfills the conditions set in the exchange of information article or other relevant legal basis;
- whether it has been signed by the Competent Authority and includes all the necessary information to process the request;
- whether the information requested is of a nature which can be provided according to the laws of the receiving State;
- whether sufficient information is provided to identify the taxpayer;
- whether sufficient information is given to understand the request; and
- whether the confidentiality of the information provided is likely to be protected.

If the request is not acceptable, the requesting State should be informed as soon as possible. If it is acceptable, the Competent Authority will forward the request to the appropriate district office where the information is to be secured or the Director, Office of International Programs, if summons activity is indicated. The Competent Authority will provide the necessary instructions to gather the information requested and stress the urgency of the request if applicable.

The Competent Authority may also invite a representative of its counterpart to clarify the request or to attend the interview of the taxpayer or even to be present in a tax examination. Some countries do not allow a representative of a foreign country to be present in a tax examination, and only certain treaties allow a foreign tax official to attend an interview of a taxpayer.

Request addressed by a tax official from a foreign country directly to U.S. tax official

Local tax officials are not permitted to directly contact their foreign counterparts unless they have received a delegation of authority from their Competent Authority and an authorization

from the foreign Competent Authority. In rare instances, a U.S. tax official may receive a request which has by-passed one or both Competent Authorities. In such a case, the tax official should immediately refer the request, without activity, to the U.S. Competent Authority. The Competent Authority may reject the information request or ask his/her counterpart to resubmit the request through official channels. In that situation, the foreign Competent Authority will produce a new request in accordance with customary procedures.

Gathering of information requested

Gathering information for a treaty partner should be given a high priority since time is generally important and since this contributes to the same type of treatment in a reverse situation. If the information is not available, the treaty partner should be informed as soon as possible via the Competent Authority.

Information available in the tax files or taxpayer contact is required

In most countries, the governing principle is that the information is to be gathered as if it were for domestic purposes. Information requested may be of two types: information that is already at the disposal of the tax administration (tax return, income declared, expenses claimed, etc.) or it may be more time consuming and require a taxpayer interview, a tax investigation, or a third party contact. Additional information of a positive or negative nature which is likely to be useful to the requesting country should also be included in the response.

Standard time objectives

The time required to obtain tax information for purposes of a treaty partner depends on whether the information is available in the tax files or whether an investigation is necessary. Some countries have set maximum time limits within which information requested should be gathered (for example, three months if the information is available in the tax authority's own records and six months otherwise). With respect to certain areas like the financial sector, the time factor is crucial and exchange of information should be given an even higher priority when it concerns financial transactions. In general, when the gathering of information is likely to take longer than reasonably expected, an interim reply should be prepared and forwarded to the Competent Authority to inform the treaty partner of the delay.

Forwarding the information to the Competent Authority

In no instance will a U.S. tax administrator disclose information directly to a foreign treaty partner. All such exchanges of information are to be through the RSR or the Assistant Commissioner (International). In order to expedite the process, and if language skills are available at the local level, a translation of the original response should be prepared in the language of the requesting State. If documents such as contracts are enclosed and cannot be translated, the relevant parts should be identified. Efforts should also be made to forward the

information in a form which meets the requesting State's needs, particularly if such use contemplates court activity and was mentioned in the original request.

Responding to the request

The Competent Authority will review the reply to determine if it is responsive and is fully within the limits of the treaty provision. If necessary, the Competent Authority will notify the taxpayer if required by domestic law. The Competent Authority will have the response translated. The forwarded information will include a statement as to the limits on the use of the information. If the information involves trade or business secrets, the Competent Authority may need to contact the requesting State in order to establish how the information is to be used and what protective measures that State has according to its internal procedures to protect such secrets. In responses where trade or business secrets may be disclosed or when a response would be contrary to public policy, the Competent Authority may elect not to provide the information. If there are objections to the original documents being disclosed to the taxpayer, the Competent Authority should inform the foreign Competent Authority accordingly.

Checklist of what to include in the response (note that exchanges should not be delayed by endeavoring to obtain every item on the checklist)

- the reference to the relevant article of the relevant treaty;
- the name, date of birth if known (in case of individuals), Tax Identification Number and addresses of the taxpayer examined;
- the name, Tax Identification Number (if known) and addresses of the foreign taxpayer or entity related to the request, and if known the registration number of the legal entity involved;
- relevant background information;
- type of taxes involved;
- the tax periods for which information is requested
- the information which was gathered (for money amounts indicate currency and whether a tax has been withheld plus the rate and amount of tax withheld);
- copies of the documents or records requested;
- the type of action taken to gather the information;
- additional information not requested but likely to be useful;
- the name, phone and fax numbers of the tax official who may be contacted if needed;
- reminder that the use of the information provided is governed by the treaty provisions;
- indication as to whether the taxpayer has been notified about the exchange;
- mention whether a trade or business secret is involved;
- mention whether feedback is requested on the usefulness of the information; and
- mention whether there are objections to notify the taxpayer or to the disclosure of the original response to the taxpayer.

note: Abbreviations should not be used.

Sending information spontaneously

Importance of spontaneous exchange

Spontaneous exchange of information involves providing a treaty partner with tax information which is assumed to be of interest to that treaty partner without having received a prior request for this information. Because of its nature, it is the form of exchange which is the most dependent upon local tax officials. This type of information is usually effective since it involves details detected and selected by a tax official of the sending State during an audit or investigation. The efficiency of a spontaneous exchange depends on the motivation and the initiative of the supplying State. It is therefore important that tax investigators forward to their Competent Authority information which seems useful to a treaty partner.

Focus on matters of importance

Spontaneous exchanges should be used for matters of importance either because of the amount of tax involved or because there is suspicion of tax evasion schemes which are likely to be used by other taxpayers.

Examples of information which may be provided spontaneously:

- Payments made to residents of the other country, when there is suspicion that the payments have not been reported;
- Business or payments which have been routed through third countries for tax evasion purposes;
- A tax reduction or exemption granted to a taxpayer which may give rise to a liability of tax or a tax increase;
- Transactions which involve residents of the other country;
- Pricing between related entities which does not conform to the arm's length standard; and
- Fraudulent schemes.

Checklist of what may be included when providing information spontaneously

- the reference to the relevant article of the relevant tax treaty or mutual assistance agreement;
- the name, date of birth if known (in case of individuals), Tax Identification Number and addresses of the taxpayer involved in the exchange;
- the name, Tax Identification Number (if known) and addresses of the foreign taxpayer or entity who is suspected not to have reported income;
- relevant background information and why it is assumed that the information may

be of interest;

- taxes involved
- the tax periods for which information is provided;
- the information which was gathered (for money amounts, indicate currency and whether a tax has been withheld, including rate and amount);
- copies of relevant documents or records;
- the name, phone and fax numbers of the tax official who may be contacted if needed;
- reminder that the use of the information provided is governed by the treaty provisions;
- indication as to whether the taxpayer has been notified about the exchange;
- mention whether feedback is requested on the usefulness of the information;
- mention whether a trade or business secret is involved; and
- mention whether there are objections to the disclosure to the taxpayer of the original documents providing information.

Note: Abbreviations should not be used.

Receiving information provided spontaneously

When receiving a spontaneous exchange of information, the Competent Authority determines whether the information should be forwarded to the local tax authorities for action, and then forwards it.

Exhibit I

LIST OF BILATERAL TAX CONVENTIONS & TAX INFORMATION EXCHANGE AGREEMENTS (TIEAs) BETWEEN THE UNITED STATES AND OTHER COUNTRIES AS OF JULY 31, 1997

	TAX TREATY	TIEA
Armenia	X	
Australia	X	
Austria	X	
Azerbaijan	X	
Barbados	X	X
Belarus	X	
Belgium	X	
Bermuda	X	X
Canada	X	
People's Republic of China	X	
Costa Rica		X
Cyprus	X	
Czech Republic	X	
Denmark	X	
Dominica		X
Dominican Republic		X
Egypt	X	
Finland	X	
France	X	
Georgia	X	
Germany	X	
Greece	X	
Grenada		X
Guyana		X
Honduras		X
Hungary	X	
Iceland	X	
India	X	
Indonesia	X	
Ireland	X	
Isreal	X	
Italy	X	
Jamaica	X	X
Japan	X	
Kazakhstan	X	
Korea	X	
Kyrgyzstan	X	
Luxembourg	X	

Marshall Islands		X
Mexico	X	X
Moldova	X	
Morocco	X	
Netherlands	X	
Netherlands Antilles	X	
New Zealand	X	
Norway	X	
Pakistan	X	
Philippines	X	
Poland		X
Portugal	X	
Peru		X
Romania	X	
Russia	X	
Slovak Republic	X	
Spain	X	
St. Lucia		X
Sweden	X	
Switzerland	X	
Tajikistan	X	
Trinidad & Tobago	X	X
Turkmenistan	X	
Tunisia	X	
Ukraine	X	
United Kingdom	X	
Uzbekistan	X	

SOURCE: The Bureau of National Affairs, Inc. - September 12, 1997

COMMENTARY ON ARTICLE 26 CONCERNING THE EXCHANGE OF INFORMATION

1. Preliminary remarks

1. There are good grounds for including in a convention for the avoidance of double taxation provisions concerning co-operation between the tax administrations of the two Contracting States. In the first place it appears to be desirable to give administrative assistance for the purpose of ascertaining facts in relation to which the rules of the convention are to be applied. Moreover, in view of the increasing internationalization of economic relations, the Contracting States have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the Convention.

2. Therefore the present Article embodies the rules under which information may be exchanged to the widest possible extent, with a view to laying the proper basis for the implementation of the domestic laws of the Contracting States concerning taxes covered by the Convention and for the application of specific provisions of the Convention. The text of the Article makes it clear that the exchange of information is not restricted by Article 1, so that the information may include particulars about nonresidents.

3. The matter of administrative assistance for the purpose of tax collection is not dealt with in the Article. This matter is dealt with in the Convention on Mutual Administrative Assistance in Tax Matters, a multilateral convention that entered into force April 1, 1995. This Convention was drawn up within the Council of Europe on the basis of a first draft prepared by the Committee on Fiscal Affairs and is open to the signature of the Member States of the Council of Europe and Member countries of the OECD. This matter can also form the subject of a separate bilateral agreement that can be negotiated between the Contracting States on the basis of the Model Convention for Mutual Administrative Assistance in the Recovery of Tax Claims adopted by the Committee on Fiscal Affairs on June 29, 1979; alternatively, provisions on assistance in the field of tax collection may be introduced in a double taxation convention, whenever Contracting States find it preferable.

4. Experience between 1963 and 1977 had shown that the text of the Article in the 1953 Draft Convention left room for differing interpretations. Therefore, it was felt desirable to clarify its meaning in the 1977 Model Convention by a change in the wording of the Article and its Commentary without altering its effects. Apart from a single point of substance (cf. paragraph 13 below) the main purpose of the changes made has been to remove grounds for divergent interpretations.

II. Commentary on the provisions of the Article

Paragraph 1

5. The main rule concerning the exchange of information is contained in the first sentence of the paragraph. The competent authorities of the Contracting States shall exchange such information as is necessary to secure the correct application of the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention even if, in the latter case, a particular Article of the Convention need not be applied. In order to keep the exchange of information within the framework of the Convention, a limitation to the exchange of information is set so that information should be given only insofar as the national tax in question is covered by the Convention and the taxation under the domestic taxation laws concerned is not contrary to the Convention. An illustration may be cited in this connection: a request for information concerning the imposition of a sales tax need not be complied with by the requested State as it is not covered by the Convention.

6. The following examples may clarify the principle dealt with paragraph 5 above. In all such cases information can be exchanged under paragraph 1.

7. Application of the Convention

a) When applying Article 12, State A where the beneficiary is resident asks State B where the payer is resident, for information concerning the amount of royalty transmitted.

b) Conversely, in order to grant the exemption provided for in Article 12, State B asks State A whether the recipient of the amounts paid is in fact a resident of the last-mentioned State and the beneficial owner of the royalties.

c) Similarly, information may be needed with a view to the proper allocation of taxable profits between associated companies in different States or the adjustment of the profits shown in the accounts of a permanent establishment in one State and in the accounts of the head office in the other State (Articles 7, 9, 23 A and 23 B).

8. Implementation of the domestic laws

a) A company in State A supplies goods to an independent company in State B. State A wishes to know from State B what price the company in State B paid for the goods with a view to a correct application of the provisions of its domestic laws.

b) A company in State A sells goods through a company in State C (possibly a low-tax country) to a company in State B. The companies may or may not be associated. There is no convention between State A and State C, nor between State B and State C. Under the convention between A and B, State A, with a view to ensuring the correct application of the provisions of its

domestic laws to the profits made by the company situated in its territory, asks State B what price the company in State B paid for the goods.

c) State A, for the purpose of taxing a company situated in its territory, asks State B, under the convention between A and B, for information about the prices charged by a company in State B, or a group of companies in State B with which the company in State A has no business contacts in order to enable it to check the prices charged by the company in State A by direct comparison (e.g. prices charged by a company or a group of companies in a dominant position). It should be borne in mind that the exchange of information in this case might be a difficult and delicate matter owing in particular to the provisions of sub-paragraph c) of paragraph 2 relating to business and other secrets.

9. The rule laid down in paragraph 1 allows information to be exchanged in three different ways:

a) on request, with a special case in mind, it being understood that the regular sources of information available under the internal taxation procedure should be relied upon in the first place before a request for information is made to the other State;

b) automatically, for example when information about one or various categories of income having their source in one Contracting State and received in the other Contracting State is transmitted systematically to the other State (see OECD Council Recommendation C(81)39/Final (5 May 1981) ("Recommendation of the Council Concerning a Standardized Form for Automatic Exchanges of Information under International Tax Agreements") and OECD Council Recommendation C(92)50/Final (23 July 1992) ("Recommendation of the Council Concerning a Standard Magnetic Format for Automatic Exchange of Tax Information"), both of which are discussed in "Tax Information Exchange Between OECD Member Countries: A Survey of Current Practices", OECD, Paris, 1994);

c) spontaneously, for example in the case of a State having acquired through certain investigations, information which it supposes to be of interest to the other State.

10. The manner in which the exchange of information agreed to in the Convention will finally be effected can be decided upon by the competent authorities of the Contracting States.

11. Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation. At the same time

maintenance of such secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 1 that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State.

12. The information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. This means that the information may also be communicated to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities only for the purposes mentioned in paragraph 1. If the information appears to be of value to the receiving State for other purposes than those referred to, that State may not use the information for such other purposes but it must resort to means specially designed for those purposes (e.g. in case of a non-fiscal crime, to a treaty concerning judicial assistance).

13. Under this Article, information may not be disclosed to authorities that supervise the general administration of the Government of a Contracting State, but are not involved specifically in tax matters. In their bilateral negotiations, however, Member countries may agree to provide for disclosure to such supervisory bodies.

14. As stated above, the information obtained can be communicated to the persons and authorities mentioned but it does not follow from this that it can be disclosed by them in court sessions held in public or in decisions which reveal the name of the taxpayer. The last sentence of the paragraph, however, opens up this possibility. Once information is used in public court proceedings or in court decisions and thus rendered public, it is clear that from that moment such information can be quoted from the court files or decisions for other purposes even as possible evidence. But this does not mean that the persons and authorities mentioned in paragraph 1 are allowed to provide on request additional information received. If either or both of the Contracting States object to the information being made public by courts in this way, or, once the information has been made public in this way, to the information being used for other purposes, because this is not the normal procedure under their domestic laws, they should state this expressly in their convention.

Paragraph 2

15. This paragraph contains certain limitations to the main rule in favor of the requested State. In the first place, the paragraph contains the clarification that a Contracting State is not bound to go beyond its own internal laws and administrative practice in putting information at the disposal of the other Contracting State. However, types of administrative measures authorized for the purpose of the requested State's tax must be utilized, even though invoked solely to provide information to the other Contracting State.

Likewise, internal provisions concerning tax secrecy should not be interpreted as constituting an obstacle to the exchange of information under the present Article. As mentioned above, the authorities of the requesting State are obliged to observe secrecy with regard to information received under this Article. A Contracting state that under its domestic law is required to notify the taxpayer that an exchange of information is proposed should inform its treaty partners in writing that it has this requirement and what the consequences are for its obligations in relation to mutual assistance.

16. Furthermore, the requested State does not need to go so far as to carry out administrative measures that are not permitted under the laws or practice of the requesting State or to supply items of information that are not obtainable under the laws or in the normal course of administration of the requesting State. It follows that a Contracting State cannot take advantage of the information system of the other Contracting State if it is wider than its own system.

17. Information is deemed to be obtainable in the normal course of administration if it is in the possession of the tax authorities or can be obtained by them in the normal procedure of tax determination, which may include special investigations or special examination of the business accounts kept by the taxpayer or other persons, provided that the tax authorities would make similar investigations or examination for their own purposes. This means that the requested State has to collect the information the other State needs in the same way as if its own taxation was involved, under the proviso mentioned in paragraph 15 above.

18. The requested State is at liberty to refuse to give information, in the cases referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement on the exchange of information which is laid down in the convention; consequently it cannot be objected that this State has failed to observe the obligation to secrecy.

19. If the structure of the information systems of two Contracting States is very different, the conditions under sub-paragraphs *a)* and *b)* of paragraph 2 will lead to the result that the Contracting States exchange very little information or perhaps none at all. In such a case, the Contracting States may find it appropriate to broaden the scope of the exchange of information.

20. In addition to the limitations referred to above, sub-paragraph c) of paragraph 2 contains a reservation concerning the disclosure of certain secret information. Secrets mentioned in this subparagraph should not be taken in too wide a sense. Before invoking this provision, a Contracting State should carefully weigh if the interests of the taxpayer really justify its application. Otherwise it is clear that too wide an interpretation would in many cases render ineffective the exchange of information provided for in the CONVENTION. The observations made in paragraph 17 above apply here as well. The requested State in protecting the interests of its taxpayers is given a certain discretion to refuse the requested information, but if it does supply the information deliberately the taxpayer cannot allege an infraction of the rules of secrecy. It is open to the Contracting

States to add further dispensations from the obligation to supply information to the items listed in sub-paragraph c), for example, information protected by provisions on banker's discretion. It has been felt necessary also to prescribe a limitation with regard to information which concerns the vital interests of the State itself. To this end, it is stipulated that Contracting States do not have to supply information the disclosure of which would be contrary to public policy (*ordre public*).

Observations on the Commentary

21. *Japan* wishes to indicate that with respect to paragraph 11 above, it would be difficult for Japan, in view of its strict domestic laws and administrative practice as to the procedure to make public the information obtained under the domestic laws, to provide information requested unless a requesting State has comparable domestic laws and administrative practice as to this procedure.

22. Contrary to the interpretation put forward in paragraphs 14 to 16 above, *Japan* and the *United Kingdom* take the view that the Article imposes no obligation on them to carry out enquiries on behalf of a Contracting State in cases where no liability to their own tax is at issue, since to carry out such enquiries would be contrary to their laws and administrative practice.

23. [Merged with paragraph 21 on 31 March 1994; see HISTORY]

Reservations on the Article

13. *Portugal* reserves the right to apply Article 26 of the 1963 version of the draft CONVENTION.

14. *Switzerland* reserves its position on this Article. When negotiating with other Member countries, Switzerland will propose to limit the scope of this Article to information necessary for carrying out the provisions of the CONVENTION.

15. *Mexico* and the *United States* reserve the right to extend the application of this Article to all taxes imposed by a Contracting State, not just taxes covered by the CONVENTION pursuant to Article 2.

Exhibit III

NORMAL TAX** YEAR FOR INDIVIDUALS AND CORPORATIONS IN OECD MEMBER COUNTRIES

COUNTRY	CALENDAR YEAR	OTHER
Australia		1st July - 30th June
Austria	X	
Belgium	X	
Canada	X	
Denmark	X	
Finland	X	
France	X	
Germany	X	
Greece	X	1st July - 30th June (1)
Ireland	X	6th April - 5th April
Iceland	X	
Italy	X	
Japan	X	
Luxembourg	X	
Mexico	X(1)	
Netherlands	X	
New Zealand		1st April - 31st March
Norway	X(1)	
Portugal	X(1)	
Spain	X	
Sweden	X	
Switzerland	X(2)	
Turkey	X	
United Kingdom		6th April - 5th April
United States	X	

**Tax year: Year of assessment of tax and not budgetary year.
(1) for enterprises keeping double-entry accounting

NOTES

To process foreign source information, the recipient country should be aware of the tax year of the sending country for statute of limitation purposes.

X For corporations the tax year corresponds to the accounting or financial year which generally corresponds to the calendar year but which may differ in some cases.

X(1) The calendar year is mandatory for both individuals and corporations. In Austria and Portugal corporations may choose a different tax period upon authorization of the Ministry of Finance.

X(2) For corporations, the federal tax and most cantonal and municipal taxes are assessed over a period of two years but collected annually.

Time Limitation on Tax Reassessments

Country	Reassessment may be carried out		
	General rule from date of original assessment	Where taxpayer has misrepresented information or tax fraud occurs (from date of original assessment)	Time limitation can be generally overridden by Double Taxation Treaty
Australia	3 years.	No limit (fraud).	A Privacy Act is in force. Complaints about privacy can be made to the Privacy Commissioner, who can order damages paid and direct government agencies to change their practices or procedures where appropriate.
Austria	5 years.	10 years (fraud).	Yes.
Belgium	3 years (from the 1st January of the assessment year).	5 years (from the 1st January of the assessment year).	Yes.
Canada	3 years.	No limit (fraud).	Generally no (occurs in some limited circumstances).
Denmark	5 years. 3 years (discretionary basis).	Longer than the general rule.	Yes.
Finland	2 years.	5 years.	No.
France	3 years.	3 + 2 years (criminal case).	No.
Germany	4 years.	10 years (in general).	Yes (if it is favourable for the taxpayer).
Greece	3 years (from the date final assessment).	10 years.	No.
Ireland	10 years (general rule). 6 years (self-assessment cases):	No limit (fraud or neglect).	Yes.
Italy	5 years for income tax (6 in no tax return). 4 years for VAT (5 in no tax return).	Same limits.	No.
Japan	3 years (from due date of filing of return). 5 years (in the case of no return).	7 years.	No.

Exhibit IV

Time Limitation on Tax Reassessments

Country	Reassessment may be carried out:		
	General rule from date of original assessment	Where taxpayer has misrepresented information or tax fraud occurs (from date of original assessment)	Time limitation can be generally overridden by Double Taxation Treaty
Netherlands	5 years	5 years (criminal offence 12 years)	Yes.
New Zealand	4 years (increase). 8 years (refund).	No limit (fraud).	No.
Norway	10 years.	No limit.	Yes.
Portugal	5 years (refund). 5 years (increase).	5 years.	Legally possible.
Spain	5 years.	5 years.	Generally, no.
Sweden	8 months	5 years. (Longer in case of tax fraud)	Yes.
Switzerland	5 years	5 years	No.
Turkey	5 years	5 years	No.
United Kingdom	6 years	20 years	No.
United States	A minimum of 3 years.	6 years (substantial omission of income without intent to defraud). No limit (fraud).	Generally, no.

From the OECD publication "Taxpayers' rights and obligations: a survey of the legal situation in OECD countries," 1990 updated tables. Table 18

Exhibit IV-2